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No. 79-512

IN THE

Supreme Court of the United States

October Term, 1979

SCINDIA STEAM NAVIGATION CO., LTD.,
Petitioner,

v.

LAURO DE LOS SANTOS AND SEATTLE STEVEDORE CO.,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF RESPONDENT, LAURO DE LOS SANTOS

JAMES A. GRUTZ
JACKSON, ULVESTAD,
GOODWIN & GRUTZ
Attorneys for Respondent,
Lauro De Los Santos

Office and Post Office Address:
1425 IBM Building
Seattle, Washington 98101
Telephone: (206) 623-2300

CRAFTSMAN PRESS SEATTLE, WASHINGTON

QUESTIONS PRESENTED FOR REVIEW

A. Did the Ninth Circuit Court of Appeals err when it held that the negligence cause of action referred to by Congress in the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C., Section 905(b), meant:

> A vessel is subject to liability for injuries to longshoremen working on or near the vessel caused by conditions on the vessel, if, but only if, the shipowner (a) knows of, or by the exercise of reasonable care would discover, the condition, and should realize it involved an unreasonable risk of harm to such longshoremen, and
> (b) the shipowner fails to exercise reasonable care under the circumstances to protect the longshoreman against danger?

B. Whether, a longshoreman, injured in the course of his employment aboard a ship, by reason of the malfunction of a ship's winch, can be barred, as a matter of law on a motion for summary judgment from recovery against the shipowner for negligence, when the shipowner has failed to repair the winch which had been malfunctioning over a two and one-half day period?

C. Have the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act substituted contributory negligence and/or assumption of risk principles for comparative negligence principles in a longshoreman's claim against a shipowner for negligence for failing to provide a safe place to work and failing to maintain and repair a defective ship's winch?

TABLE OF CONTENTS

Page

Questions Presented for Review i

I. Applicable Statutes 1

II. Statement of the Case 2

A. Statement of the Case 2

B. Statement of Facts 3

III. Summary of Argument 7

IV. Argument 8

A. Background—Negligence Action Retained 8

B. Summary Judgment Inappropriate 12

C. The 1972 Amendments to the Longshoremen's and Harbor Workers Compensation Act Have Not Substituted Assumption of Risk and Contributory Negligence Principles for Comparative Negligence Principles 22

D. Negligence-Concurrent Negligence-Comparative Negligence 34

E. Safe Place to Work—Dangerous Conditions 36

F. Argument in Response to Petitioner's Brief 38

G. Response to Amicus Brief in Support of Petitioner 44

V. Conclusion 48

Appendix I I-1

Appendix II II-1

Page

TABLE OF AUTHORITIES

Table of Cases

Albanese v. N/V Nederl. Amerik Stomov. Maats, 346 F.2d 481 (2d Cir.), *rev'd per curiam*, 382 U.S. 283, 15 L. Ed. 2d 327, 86 S. Ct. 429, *reh. den.*, 382 U.S. 1000, 15 L. Ed. 2d 490, 86 S. Ct. 534 (1965) 38

Anuszewski v. Dynamic Mariners, 540 F.2d 757 (4th Cir. 1976) 24, 26

Arney v. United States, 479 F.2d 653 (9th Cir. 1973).... 13

Bender v. Dingworth, 425 F.2d 378 (5th Cir. 1970) 36

Bloomer v. Liberty Mutual Insurance Co., 100 S. Ct. 925 (1980) 9

Brown v. Ivarans Rederi A/S, 545 F.2d 854 (3d Cir. 1976), *cert. denied*, 430 U.S. 969 (1977) 9, 32, 37

Cameron v. Vancouver Plywood Corp., 266 F.2d 535 (9th Cir. 1959) 13

Canizzo v. Farrell Lines, Inc., 579 F.2d 682 (2d Cir. 1978), *cert. denied*, 439 U.S. 929 (1978) 26

Gates v. Beauregard Electric Cooperative, Inc., 328 So. 2d 367 (La. 1976), *cert. denied*, 429 U.S. 833 (1976)..34

Chavis v. Finnlines Ltd., 576 F.2d 1072 (4th Cir. 1978)..26

Clemons v. Mitsui O.S.K. Lines, Ltd., 596 F.2d 746 (7th Cir. 1979) 24, 26

Cox v. Flota Mercante Grancolombiana, S.A., 577 F.2d 798 (2d Cir. 1978) 26

Croshaw v. Koninklijke Ned Lloyd, B.V. Rifswijk, 398 F. Supp. 1224 (D. Ore. 1975) 24

Davis v. Inca Comp. Naviera, 440 F. Supp. 448 (W.D. Wash. 1977) 21

Dorton v. Darby, 373 F.2d 619 (5th Cir. 1967) 13

Edmonds v. Campagnie Generale Transatlantique, 443 U.S. 256 (1979) 9, 10, 34, 35, 44, 46

Federal Marine Terminals Inc. v. Burnside Shipping Co., 394 U.S. 404 (1969) 34

Page

Gallardo v. Westfal-Larsen & Co. A/S.,
435 F. Supp. 484 (N.D. Cal. 1977) 28, 32, 38

Garrett v. Moore-McCormack Co., 317 U.S. 239 (1949)..23

Gay v. Ocean Transport & Trading Ltd.,
546 F.2d 1233 (5th Cir. 1977) 25, 27, 31

Gerrity v. Kate Cann, 2 F. 241 (D.N.Y. 1880) 9

Griffith v. Wheeling-Pittsburgh Steel Corp.,
610 F.2d 116 (3d Cir. 1979) 32, 33, 34, 35

Gutierrez v. Waterman Steamship Corp.,
373 U.S. 206, *reh. den.*, 374 U.S. 858 (1963)..... 11

Hartzog v. Head Line Co.,
358 F.2d 916 (N.D. Ill. 1973) 13

Hess v. Upper Mississippi Towing Corp.,
559 F.2d 1030 (5th Cir. 1977) 37

In re Dearborn Marine Service, Inc., 499 F.2d 263 (5th Cir. 1974), *pet. for rehearing den.*, 512 F.2d 1061....20-21

International Stevedoring Co. v. Haverty,
272 U.S. 50, 47 S. Ct. 19 (1926) 34

Johnson v. A/S Ivarans Rederi A/S,
613 F.2d 334 (1st Cir. 1980) 9, 10-11, 32, 33

Kermarec v. Compagnie Generale Transatlantique,
358 U.S. 625 (1959) 7, 33, 48

Landon v. Lief Hoegh & Co.,
521 F.2d 756 (2d Cir. 1975) 35, 38

Leaf v. United States, 588 F.2d 733 (9th Cir. 1978)..... 13

Leathers v. Blessing, 105 U.S. 626 (1882) 9

Lopez v. A/S D/S Svendborg,
581 F.2d 319 (2d Cir. 1978) 26, 35

Lurbrano v. Royal Netherlands,
572 F.2d 364 (2d Cir. 1978) 26

Marant v. Farrell Lines, 550 F.2d 142 (3d Cir. 1977) .. 35

Matthews v. Ernest Russ S.S. Co.,
603 F.2d 676 (7th Cir. 1979) 26

Page

Miller Adm. v. Union Pacific R.R., 290 U.S. 227 (1933).. 36

Migut v. Hyman-Michaels Co.,
571 F.2d 352 (6th Cir. 1978) 37

Mitchell v. Trawler Racer, 362 U.S. 539 (1960) 11

Mounsey v. Ellard,
363 Mass. 693, 297 N.E.2d 43 (Mass. 1973) 34

Napoli v. Hellenic Lines, Ltd.,
536 F.2d 505 (2d Cir. 1976) 21, 25, 26, 37

O'Leary v. Coenen, 251 N.W.2d 746 (N.D. 1977) 34

Poller v. Columbia Broadcasting Systems,
368 U.S. 464 (1962) 13

Pope & Talbot, Inc. v. Hawn, 346 U.S. 406 (1954) 9, 23

Ramirez v. Toko Kaium K.K.,
385 F. Supp. 644 (N.D. Cal. 1974) 24, 27

Rowland v. Christian, 69 Cal. 2d 108, 70 Cal. Rptr. 97,
443 P.2d 561 (1968) 34

Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp.,
350 U.S. 124 (1956) 9, 41

Seas Shipping Co. v. Sieracki, 328 U.S. 85 (1946) 8

Shapiro v. Glekel, 380 F. Supp. 1053 (S.D.N.Y. 1974) .. 13

Shepler v. Weyerhaeuser Company,
279 Or. 477, 569 P.2d 1040 (Or. 1977), *cert. denied*,
434 U.S. 1051 .....32, 33, 37

Slaughter v. Ronde, 390 F. Supp. 637 (S.D. Ga. 1974),
aff'd per curiam, 509 F.2d 973 (5th Cir. 1975) 37

Socony-Vacuum Oil Co. v. Smith, 305 U.S. 424 (1939).. 23

Solsvik v. Maremar Compania Naviera, S.A.,
399 F. Supp. 712 (W.D. Wash. (1975) 37

Spinks v. Chevron Oil Co.,
507 F.2d 216 (5th Cir. 1975) 21, 36

The Max Morris, 137 U.S. 1 (1890) 9, 23

United States v. Diebold, Inc., 369 U.S. 654 (1962) 13

Page

United States v. Dollar,
196 F.2d 551 (9th Cir. 1952) 13

United States v. Perry,
431 F.2d 1020 (9th Cir. 1970) 13

Van Horn v. Gulf Atlantic Towing Corporation,
388 F.2d 636 (4th Cir. 1968) 18, 19, 37

Webb v. City & Borough of Sitka,
561 P.2d 731 (Alas. 1977) 34

West v. United States, 361 U.S. 118 (1959) 37

White v. United States, 400 F.2d 74 (4th Cir. 1968) 37

Wiles v. Delta Steamship Lines,
1976 A.M.C., 2646 (E.D. La. 1976) 30

Statutes

29 C.F.R. § 1918.2(b) 45

29 C.F.R. § 1915.1(d) 45

29 C.F.R. § 1918.53(c)(2) 16, 28

33 U.S.C. § 902(3)(4) 8

33 U.S.C. § 905(b) .....i, 1-2, 3, 9, 23
et. seq.

33 U.S.C. § 933 42

33 U.S.C. § 933(a) 2, 9

33 U.S.C. § 933(i) 2

Annotations and Textbooks

32 A.L.R. 3d 508 (1970) 34

57 Am. Jur. 2d § 176 (2d ed. 1971) 36

1A, Benedict on Admiralty §§ 111, 112 (6th ed. Jhirad, 1979) 9

3 E. Devitt and C. Blackmar, Federal Jury Practice and Instructions, § 80.19 (2d Ed. 1977) 36

Fleming, The Law of Torts, 111 (3d ed. 1965) 33

Page

Gilmore and Black, The Law of Admiralty, 436 (2d ed. 1975) 8

28 Hastings L.J. 771 (1977) 39, 40

7 Journal of Maritime Law and Commerce 447 (1976).. 22

2A A. Larson, The Law of Workmen's Compensation § 71 (1976) 8

2A A. Larson, The Law of Workmen's Compensation § 75.22 (1976) 46

W. Prosser, Handbook of the Law of Torts, §§ 32, p. 151 (4th ed. 1971) 33, 36, 43

Restatement (Second) of Torts § 343 (1965)..3, 22, 24, 25, 26 *et. seq.*

Restatement (Second) of Torts § 343(A) ....3, 22, 24, 25, 26 *et. seq.*

4 The Mar. Law. 305 (1979) 26

6 Washington Practice, Washington Pattern Jury Instructions, Civil (1967), W.P.I. 15.01 36

Other Authority

Fed. R. Civ. P. 56 13

H.R. Rep. No. 92-1441, 92nd Cong., 2d Sess. (1972), *reprinted in* 1972 U.S. Code Cong. & Admin. News 4698-4705 10

H.R. Rep. No. 2448, 96th Cong., 2 CCH Cong. Index (1980) 48

S. Rep. No. 92-1125, 92nd Cong., 2d Sess., pp. 8-12 10

S. Rep. No. 1511, 96th Cong., 1 CCH Cong. Index (1980) 48

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ON WRIT OF CERTIORARI TO THE
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BRIEF OF RESPONDENT, LAURO DE LOS SANTOS

I.

APPLICABLE STATUTES

Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §905(b) (1976):

> In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party, in accordance with the provisions of Section 933 of this title, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. If such person was employed by the vessel to provide ship building or repair services, no such

action shall be permitted if the injury was caused by the negligence of persons engaged in providing ship building or repair services to the vessel. The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter.

33 U.S.C. §933(a) (1976):

If on account of a disability or death for which compensation is payable under this chapter the person entitled to such compensation determines that some person other than the employer or a person or persons in his employ is liable in damages, he need not elect whether to receive such compensation or to recover damages against such third person.

33 U.S.C. §933(i) (1976):

The right to compensation or benefits under this chapter shall be the exclusive remedy to an employee when he is injured, or to his eligible survivors or legal representatives if he is killed, by the negligence or wrong of any other person or persons in the same employ; *Provided,* That this provision shall not affect the liability of a person other than an officer or employee of the employer.

II.

STATEMENT OF THE CASE

A. Nature of the Case

This is a personal injury case brought by a longshoreman, in the United States District Court of the Western District of Washington with a demand for trial by jury. Based upon the evidence disclosed in the depositions, the attorney for the defendant moved for summary judgment. Briefs were submitted by both parties.

On September 1, 1976, the Honorable Walter T. McGovern signed an order granting summary judgment of dismissal. Santos filed a timely notice of appeal.

The order and opinion of the district court are not officially reported but are found at 1976 A.M.C. 2583 and are set forth in appendix pages A-1 through A-6 of the Petition for Writ of Certiorari.

The United States Court of Appeals for the Ninth Circuit reversed the judgment and remanded the case for further proceedings on May 1, 1979. The opinion of the court is reported at 598 F.2d 480 and is set forth in appendix B-1 through B-23 of the Petition for Writ of Certiorari. The shipowner petitioned for rehearing and the court of appeals denied the petition in a *per curiam* opinion which was not officially reported, but is set out in appendix C-1 through C-3 of the Petition For Writ of Certiorari.

The appellate court ruled that: (1) the district court's dismissal of the Santos claim misdefined the negligence standard under §905(b); (2) the district court relied upon §343 and §343A, Restatement (Second) of Torts (1965) which embrace the forbidden concepts of assumption of risk and contributory negligence; (3) the district court had inappropriately decided reasonably disputable factual issues against Santos.

B. Statement of Facts

The plaintiff, Santos, was severely injured on December 10, 1972, while working as a longshoreman aboard the vessel M/S JALARATNA. Certain of the facts involved in the case are not in dispute as indicated by the "admitted facts" section of the pre-trial order (JA 10, 11). Those facts are as follows:

On December 10, 1972, Santos was employed as a longshoreman by Seattle Stevedoring Company aboard the ves-

sel M/S JALARATNA. The vessel was moored at the Fisher Flour Mills' dock in Seattle, engaged in loading sacks of bulgar wheat for the far east. The defendant, Scindia Steam Navigation Co., Ltd., of Bombay, India, was the owner of the vessel M/S JALARATNA.

Santos worked as a longshoreman on the night shift in the No. 3 hatch, commencing at 7:00 p.m., on December 10, 1972, and was engaged in stowing the sacks of bulgar wheat being brought in by the ship's winch. He worked continuously in the No. 3 hatch from 7:00 p.m., until the injury at 8:45 p.m.

A short time prior to the accident, a pallet board containing about seventy 50-lb. sacks of wheat was lowered into the No. 3 hatch and struck the pallet jack. About half the sacks were spilled into the hatch.

Following the spilling of the sacks from the pallet board, the balance of the load was lifted by the winch driver upon the instructions of the hatch tender. The load was raised about fifteen feet to the coaming of the hatch and held there while Santos and his fellow worker were engaged in cleaning up the spilled sacks from the deck of the hatch. After about ten minutes, while Santos and his fellow worker were still engaged in cleaning up the spilled sacks of wheat, several more sacks fell from the raised pallet board. The sacks fell into the No. 3 hatch, striking plaintiff and injuring him.

The remaining facts of the case are contained in the deposition testimony of the winch driver, Lester Hawran, the hatch tender, Alvin Botler, and Mr. Santos. Mr. Santos was working in the hold of the ship stowing the sacks. On December 10, Mr. Botler was the hatch tender (R. Hawran Dep. 9). As the winch driver lowered the load into the hatch, he received a signal from the hatch tender to stop the load, but the winch did not stop the load when the controls were put in the stop position. The load hit the

pallet jack and spilled many of the sacks from the pallet board (R. Hawran Dep. 12). The winch had been failing to hold and/or stop the loads during the work shifts on December 8th, 9th and 10th. The winch driver had complained to his foreman that the brakes on the winches were not holding (R. Hawran Dep. 6, 12, 17, 27, 30, 57).

After the sacks had spilled, the hatch tender signaled the winch driver to pick up the load and to hold it twelve to fifteen feet above the bottom of the hold (R. Hawran Dep. 13; Botler Dep. 37, 38). The load was held in that position so that Mr. Santos and his partner could clear away the sacks which had fallen. The runway had to be cleared before the remainder of the load could be landed (R. Hawran Dep. 14, 44, 45; Botler Dep. 11, 12, 40). Santos and his partner were doing their job cleaning up the spilled sacks at the time the other sacks fell and injured Santos (R. Hawran Dep. 40; Botler Dep. 59). As the winch held the partial load in the air, and Santos and his partner worked to clean up the landing area, additional sacks worked loose because of the creeping and slipping of the winch (R. Hawran Dep. 58, 59).

Santos and his partner had worked eight to ten minutes while the partial load was suspended. During that time the partial load had crept down and was raised three or four times during the clean-up procedure. The additional sacks worked loose because of the creeping and slipping of the winch and the need to adjust the load by raising it after it had slipped (R. Hawran Dep. 57, 59). The brakes did not hold the load and caused the additional sacks to fall (R. Hawran Dep. 16).

The hatch tender, Botler, testified that December 10th was his first work shift aboard the vessel. He replaced the hatch tender who had worked the previous two evenings (R. Hawran Dep. 4, 5). Mr. Botler was not aware that there had been earlier difficulties with the winches. He could see that Hawran was having some difficulty, but

did not know that the brakes were faulty at the time (R. Botler Dep. 7, 8). After the accident when Botler was driving the winches, he noticed that the brakes did not stop when the winches were cut off (R. Botler Dep. 7, 8, 12). After the initial spill, Botler signaled the winch driver to hold the load twelve to fifteen feet in the air while the men in the hold cleaned up. The hatch tender believed there was only one way to clear the area and that was to pick the load up and hold it there. Suddenly, he noticed the remaining sacks start to slide and fall upon the plantiff working below (R. Botler Dep. 10). He yelled a warning, but it was too late (R. Botler Dep. 42, 43). One sack hit the plaintiff in the back of the neck and two others also struck him (R. Botler Dep. 10).

Mr. Santos testified that after the first half of the load was spilled, when the load hit the pallet jack, he knew it was his duty to clean up the spilled sacks (R. Santos Dep. 41, 42, 45, 57 and 58).

The winch driver, Hawran, testified that the M/S JALARATNA was the only ship that he had ever worked on in the eighteen years he had been a longshoreman that positioned the winch controls so high and way up near the "cross tree" (R. Hawran Dep. 3, 6). The electric winches were part of the ship (R. Hawran Dep. 8, 17, 24), and on the Indian ships the winches were generally bad (R. Hawran Dep. 6, 18, 20, 21). The platform upon which the winch driver was operating the winches was in the cross tree of the ship more than twenty-five feet above the deck (R. Hawran Dep. 18; Botler Dep. 24). He could not see the hatch or the area where the men were working (R. Hawran Dep. 31, 32). He, therefore, had to rely on the hatch tender for signals to stop the load as it was lowered into the hold (R. Hawran Dep. 9, 33). Botler testified that he believed this was the only ship that had the winches set in the crow's nest. Most other ships had the winch controls positioned so that the winch driver

could see what was going on (R. Botler Dep. 11, 12, 21, 22, 24).

When Hawran went to work on December 8, he complained to his foreman that the brakes were not holding on the winches and was told that the "day shift was complaining and they just can't seem to do anything with them." (R. Hawran Dep. 6).

The sacks that were left on the pallet board after the initial spill looked like they were going to stay where they were (R. Botler Dep. 47). It was Botler's best judgment that the load should be picked up and held while Santos and his partner worked to clean up the mess (R. Botler Dep. 48, 50). After the load was picked up and held, Botler inspected it and it appeared to be fine. It did not appear to be dangerous (R. Botler Dep. 52). If he hadn't felt the load was safe, he wouldn't have had it held there (R. Botler Dep. 14).

III.

SUMMARY OF ARGUMENT

Although shipowners asked for immunity from all third-party liability, Congress, in passing the 1972 amendments chose to abolish the unseaworthiness cause of action only, but chose to preserve for longshoremen the negligence cause of action against shipowners. The maritime prohibitions against assumption of risk and contributory negligence defenses were also reaffirmed. The circuit court reversed the district court in this case because of its use of the prohibited defenses and because the Court inappropriately made "findings of fact" on a motion for summary judgment. The rule adopted by the circuit court in this case is consistent with the several congressional goals expressed in the congressional reports, is faithful to traditional negligence concepts and is patterned on this Court's decision in *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625 (1959).

IV.

ARGUMENT

A. Background — Negligence Action Retained

The Longshoremen's and Harbor Workers' Compensation Act (hereinafter, the Act) set up a compensation system which insulated the employer (the Stevedore Company, 33 U.S.C. §902 (3)(4) (1976)) from liability in exchange for compensation benefits. Since its inception, the Act has made no attempt at insulating any other entities or parties from liability for damages. On the contrary, it has preserved the right to sue any other negligent parties. Thus, the Act is quite similar to many other compensation Acts, particularly the state workmen's compensation acts. In most, if not all of these acts, the right of an injured workman to sue a negligent third party is preserved. 2A A. Larson, The Law of Workmen's Compensation §71, p.14-1 (1976). Typically, the system that has arisen around third-party actions provides that after the worker receives compensation through the particular compensation act, he must repay the compensation program the amount received in medical payments, time loss payments, and disability benefits from the proceeds of any third-party recovery. The Act made the compensation remedy exclusive against the injured worker's employer, but preserved the worker's right to bring a tort action against any other liable entity. Gilmore and Black, The Law of Admiralty, 436 (2d ed. 1975).

As this honorable Court well-knows, the case law development of longshoremen's third-party rights expanded out of the pure negligence areas and into the "warranty of seaworthiness" protection which had formerly been afforded only to seamen. *Seas Shipping Co. v. Sieracki*, 328 U.S. 85 (1946). The 1972 amendments to the Act abolished the unseaworthiness remedy recognized in *Sieracki*. The amendments eliminated any action for indemnity by the shipowner against the stevedore company as

recognized in *Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp.*, 350 U.S. 124 (1956). The amendments limited the longshoreman's right of action against the shipowner to one based on negligence. 33 U.S.C. §905(b); *Bloomer v. Liberty Mutual Insurance Co.*, 100 S. Ct. 925 (1980); *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256 (1979). From its inception, the 1927 Act provided for suit against any other person or entity "liable in damages," 33 U.S.C. §933(a). That section was not altered by the 1972 amendments, but the scope of the longshoremen's right to sue a third party was restricted with reference to the shipowner by §905(b) to injuries caused by the "negligence" of the shipowner or vessel.

33 U.S.C. §905(b) simply abolished the unseaworthiness remedy, eliminated the indemnification action by the shipowner against the stevedore and limited the longshoreman's action against the shipowner to one based on negligence. *Bloomer; Edmonds.* The history of third-party negligence actions in longshore personal injury cases was so well-established at the time of the 1972 amendments that the language concerning the negligence of the ship or shipowner did not create a new cause of action, but simply preserved and retained the negligence cause of action against the ship and shipowner as it had been known in the case law long before the 1972 amendments. *Edmonds; Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406 (1953); *The Max Morris*, 137 U.S. 1 (1890); *Johnson v. A/S Ivarans Rederi*, 613 F.2d 334 (1st Cir. 1980); *Brown v. Ivarans Rederi A/S*, 545 F.2d 854 (3d Cir. 1976), *cert. denied*, 430 U.S. 969 (1977); *Leathers v. Blessing*, 105 U.S. 626 (1882); *Gerrity v. Kate Cann*, 2 F. 241 (D.N.Y. 1880); 1A, Benedict on Admiralty §§111, 112 (6th ed. Jhirad, 1979).

At the time of the 1972 amendments to the Act, Congress was faced with a large body of case law dealing with the rights of longshoremen vis-a-vis the shipowner as a

result of the shipowner's negligence. A second large body of case law existed which dealt with a longshoreman's rights vis-a-vis a shipowner, as a result of the unseaworthiness of the shipowner's vessel. Congress was aware of both bodies of existing case law at the time of the amendments to the Act. Congress understood the law as it existed at the time of the amendments and specifically intended to change only those rules of maritime law that it clearly addressed. Congress clearly intended to continue the rules of maritime law that it chose not to change. *Edmonds,* 443 U.S. at 272, 273. The complete Senate Report pertinent to the issues presented in this case is attached hereto as Appendix I.[1]

Congress intended to "retain" and "continue" the long familiar negligence action, but simply chose to abolish the unseaworthiness action. The committee reports state that "persons to whom compensation is payable under the Act *retain the right to recover damages for negligence against the vessel,* but under these amendments they cannot bring a damage action under the judicially-enacted doctrine of unseaworthiness." (Emphasis added) Appendix I-10.

The Senate Report states at 5:

> The bill reported by the committee meets these objectives by specifically eliminating suits against vessels brought for injuries to longshoremen under the doctrine of unseaworthiness and outlawing indemnification actions and "hold harmless" or indemnity agreements. It *continues to allow suits against vessels or other third parties for negligence.*

(Emphasis added) Appendix I-6. The court in *Johnson v. A/S Ivarans Rederi, supra,* at 613 F.2d 339, observed that

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1. The House Report No. 92-1441, 92nd Cong., 2d Sess., (1972), reprinted in 1972 U.S. Code Cong., and Admin. News 4698-4705 is identical to the Senate Report No. 92-1125, 92d Cong., 2d Sess., pp. 8-12 in its discussion of the elimination of the unseaworthiness remedy and the retention of the negligance action against the shipowner.

the legislative history "strongly implies that Congress believed the 1972 amendments continued rather than created a duty on the part of the vessel to maintain a safe place to work."

Congress was aware of the rule that there was a "complete divorcement of unseaworthiness liability from concepts of negligence." *Mitchell v. Trawler Racer,* 362 U.S. 539, 550 (1960). The negligence cause of action was discussed by this Court in the case of *Gutierrez v. Waterman Steamship Corp.,* 373 U.S. 206, 210, *reh. den.,* 374 U.S. 858 (1963). The shipowner was found negligent in allowing beans to be unloaded in defective bagging which caused the beans to spill out of the broken bags throughout the unloading process.

The discussions, both in the majority and dissenting opinions, in the *Gutierrez* case, point up the clear distinction between concepts of unseaworthiness and those of negligence. In the unseaworthiness action, the knowledge of the shipowner was irrelevant. His opportunity to discover and correct the defective and dangerous condition, was irrelevant. In the negligence action, the question was whether the shipowner knew or should have known of the defective condition of the bags being unloaded. In the case at bar, the question is whether the shipowner knew or should have known of the defective and slipping winch, and whether the shipowner knew or should have known of the dangers attendant upon placement of a winch driver so high above the deck that he could not see the loading operation.

That Congress clearly understood the distinction between negligence and unseaworthiness is demonstrated in the committee reports:

> For example, under present law, if a member of a longshore gang spills grease on the deck of a vessel and a longshoreman slips and falls on the grease a few moments later, the vessel is liable to pay damages

> for the resulting injuries, even though no member of the crew was responsible for creating the unseaworthy condition or was even aware of it.

Appendix I-8. The reports continued.

> So, for example, where a longshoreman slips on an oil spill on a vessel's deck and is injured, the proposed amendments to Section 5 would still permit an action against the vessel for negligence. To recover he must establish that: 1) the vessel put the foreign substance on the deck, or knew that it was there, and willfully of [sic] negligently failed to remove it; or 2) the foreign substance had been on the deck for such a period of time that it should have been discovered and removed by the vessel in the exercise of reasonable care by the vessel under the circumstances. The vessel will not be chargeable with the negligence of the stevedore or employees of the stevedore.

Appendix I-10.

The quotations above demonstrate that Congress knew and appreciated the difference between negligence and unseaworthiness and intended that the negligence action be retained but that the unseaworthiness cause of action be abolished.

B. Summary Judgment Inappropriate

Santos alleged that the shipowner was negligent and careless:

(1) In failing to provide Santos with a safe place to work aboard the vessel M/S JALARATNA;

(2) In providing the longshoremen with a faulty and malfunctioning winch;

(3) In failing to have the faulty winch repaired prior to the time of the accident.

The district court held there was no material question of fact to be decided by a jury and granted the shipowner's motion for summary judgment. The circuit court reversed because the district court had decided reasonably disputable factual issues against Santos.

On a motion for summary judgment, all of the facts surrounding the allegations of negligence must be viewed in a light most favorable to the non-moving party, Santos. It is only where there is no material question of fact that a motion for summary judgment pursuant to Fed. R. Civ. P. 56 can be granted. *Poller v. Columbia Broadcasting Systems,* 368 U.S. 464, 467 (1962); *United States v. Diebold, Inc.,* 369 U.S. 654, 655 (1962).

Not only are the facts viewed in a light most favorable to the non-moving party but all reasonable inferences to be drawn from the facts are to be so viewed. If the evidence presented on the motion for summary judgment is subject to conflicting interpretations or if reasonable men might differ as to its significance, summary judgment is improper. *United States v. Perry,* 431 F.2d 1020 (9th Cir. 1970); *Cameron v. Vancouver Plywood Corp.,* 266 F.2d 535 (9th Cir. 1959); *United States v. Dollar,* 196 F.2d 551 (9th Cir. 1952). Furthermore, the question of whether the shipowner acted as a reasonably prudent and careful shipowner under the circumstances existing at the time of plaintiff's injury is a jury question. The reasonable man standard is within the special competence of the jury and, therefore, the issues of negligence, contributory negligence and proximate cause cannot ordinarily be determined on a motion for summary judgment. *Leaf v. United States,* 588 F.2d 733 (9th Cir. 1978); *Arney v. United States,* 479 F.2d 653 (9th Cir. 1973); *Dorton v. Darby,* 373 F.2d 619 (5th Cir. 1967); *Shapiro v. Glekel,* 380 F. Supp. 1053 (S.D.N.Y. 1974); *Hartzog v. Head Line Co.,* 358 F.2d 916 (N.D. Ill. 1973).

The district court granted the motion for summary judgment only after resolving several disputed facts against Santos. It is respectfully submitted that the district court subverted the jury's function by weighing the evidence, by making factual "findings," by deciding questions of negligence, contributory negligence, and proximate cause,

when reasonable minds could differ. For example, the district court made the following "findings" of fact which were crucial to any standard of negligence:

1. The shipowner did not know the ship's gear was defective.[2]

2. The shipowner should not reasonably have been expected to know the gear was defective.[2]

3. Exclusive control of the gear was exercised by the stevedores during the relevant time period.[2]

4. The premises were in the exclusive control of the stevedores during the loading operations.[2]

5. No one from the ship's crew was ever informed of the winch's condition prior to the accident.[2]

6. The initial spillage of sacks was caused by the pallet striking the pallet jack.[2]

7. Following the initial spillage, the pallet was raised fifteen feet overhead by the winch driver and left to swing overhead.[2]

8. The jumpiness of the winch was open and obvious to the plaintiff.[3]

9. The plaintiff's activities were so dangerous that he cannot recover against the shipowner.[4]

10. Plaintiff recognized that the circumstances were so dangerous that he cannot recover.[4]

These examples are surely findings of fact. Certainly, reasonable minds could differ on these "facts." In "findings of fact" 1 and 2, a jury could have found, for example, based on the depositions, that the shipowner, in fact, did know that the gear was defective. There is uncontradicted evidence that the winch had been malfunctioning for two

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2. Appendix A, Petition for Writ of Certiorari, p. A-4, District Court's Memorandum and Order Granting Summary Judgment of Dismissal.

3. *Id.* at A-5.

4. *Id.* at A-5, A-6.

and one-half days prior to the day of the accident and that during that time the representatives of the shipowner were back and forth in the vicinity of the loading operation. (R. Hawran Dep. 60; Botler Dep. 53). A jury could have found that the winch had been malfunctioning for two full days prior to the accident and that this length of time was adequate (contrary to the district court's "findings") for a reasonably prudent shipowner to discover and correct the defect. A jury could have found that, in the words of Hawran, "the day shift was complaining [about the winches] and they [the shipowner] just can't seem to do anything with them." R. Hawran Dep. 6).[5]

In "findings of fact" 3 and 4, the district court found that the premises were in the exclusive control of the stevedores during the relevant time period. The court found that there was no dispute on that question. There is, in fact, a very serious dispute as to exactly what control was within the power of the stevedores and what remained in the shipowner. The defective winch belonged to the shipowner as an integral part of the ship itself.

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5. Similarly, in "finding of fact" 5, the district court "found" that the ship's crew was never informed of the winch's condition prior to the accident and that the ship's crew did not know of the winch's condition prior to the accident. This is a pure "finding of fact." Such "fact finding" is beyond the power of the district court on a motion for summary judgment. In the instant case, the shipowner has come forward with no evidence in affidavit form or otherwise to indicate what its state of knowledge was prior to the Santos injury. The shipowner has come forward with no evidence indicating what the state of repair of the winch was. The shipowner chose to stand mute. The district court mistakenly placed upon Santos the onus of the shipowner's failure to come forward with any evidence. The court inappropriately viewed the facts and inferences in a light most favorable to the shipowner.

A fact finder could infer that the shipowner had actually been informed about the winch's condition prior to the accident (R. Hawran Dep. 6, 17).

Neither the plaintiff, Santos, nor any of the other longshoremen had any authority to take it upon themselves to repair the winch. 29 C.F.R. §1918.53(c)(2) probihits the stevedore from adjusting or repairing the electric control circuits of the winches. Repair of the winch in any respect was not within the province of the longshoremen or their employer.

Paragraph 7 of the "admitted facts" portion of the pretrial order (J.A. 11) states that the Seattle Stevedore Company was "in control of the loading." This fact is far from an admission that the "control of the premises" or the "control of the gear" was exclusively in the stevedores. Such a "finding" is absolutely unsupported by any evidence in this record. A fact finder would have the right to find that the shipowner maintained ultimate control over the ship and its gear, and the amount of control the longshoremen had in conducting their operations was extremely limited. It did not extend to the repair of the ship's gear or the alteration of the ship's gear in any way that would have been necessary to correct a slipping, defective ship's winch. A jury could find that plaintiff, Santos, had no control over the premises or gear. The evidence is uncontradicted that Santos was a "hold" man who worked at the bottom of the hierarchy of command or control of the ship in the loading operation. The "relevant time period" determination was a jury question.

In "finding of fact" 6, the district court "found" that the initial spillage was caused by the pallet striking the pallet jack, when the evidence is uncontradicted that the initial problem was caused by the winch failing to stop the load even though it was in an "off" position (R. Hawran Dep.

12, 13); Botler Dep. 9, 10). The district court's "finding" implies strongly that there was either nothing wrong with the winch or that the cause of the initial spillage was negligence of the winch driver when there was evidence that the spillage was caused by the defective brakes on the winch. The weighing of evidence on the question of cause was a jury function.

In "finding of fact" 7, the district court "found" that the partially spilled pallet was raised fifteen feet overhead by the winch driver and left to "swing" overhead. There is a significant dispute in the evidence concerning the exact amount of movement, if any, the pallet underwent immediately prior to the accident.[6]

In "findings of fact" 8, 9, and 10, the district court "found" the load's position as "dangerous." The amount

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6. The persons in the best position to see the load testified there was little, if any, movement (R. Hawran Dep. 42; Botler Dep. 39). The amount of swinging is significant because Santos claimed that the remaining sacks of wheat did not loosen because the pallet swung back and forth, but because the winch continued to be defective in its braking mechanism and allowed the pallet to creep down, requiring the winch driver to keep moving the pallet back up to its desired height and thus causing additional sacks to work loose. It is also most important because the evidence concerning the personal knowledge of Santos as to exactly what danger he faced, is subject to inference. Thus, it is arguable that the only knowledge that Santos had concerning the malfunctioning winch prior to his accident and his only knowledge concerning "danger" was limited to some appreciation that the winch driver was having trouble landing the loads because of jerkiness of the winch, but that his knowledge did not include the fact that the brakes on the winch were not holding the loads. It is further inferable that his appreciation of the danger he faced was simply that of the danger of a longshoreman in working in areas in which loads were coming in from above, a situation hardly unusual for a "hold" man who worked under loads constantly. The crucial finding of danger is necessarily dependent upon a weighing of the testimony and a drawing of inferences. These were all jury questions. Santos had no appreciation that the load was slipping as he worked to clean up the spill nor did he know that the brakes were not holding on the winches.

of danger is a crucial "finding." It should have been left to the jury.[7] There is considerable conflict between what the district court "found" to be obvious facts and what the persons on the scene felt to be the case. The hatch tender believed that the method of operation which he adopted was the proper one under all the circumstances existing at the time and immediately prior to the accident. He did not discuss this with Mr. Santos, he merely went forward in the same way that was generally accepted procedure. Whether Santos acted prudently under the circumstances existing in the hold of the vessel just before his accident, considering his position in the hierarchy of command, was a question of fact for the jury. In the case of *Van Horn v. Gulf Atlantic Towing Corporation,* 388 F.2d 636, 639, (4th Cir. 1968), the court said at 639:

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7. The hatch tender testified concerning the danger as he saw it (R. Botler Dep. 47, line 7):

Q. How did this pallet load look after it was raised back up? Can you describe how the sacks appeared on the pallet then?

A. The ones that were on there looked like they were going to stay where they were unless somebody took them off.

Botler continued to testify at page 52:

Q. Okay, thank you. Is there some reason it was less dangerous to Mr. Santos in the hold being suspended up ten or twelve feet?

A. It didn't seem like it was dangerous to me at all.

Q. Even though half had spilled and it wasn't square and balanced, right. The tie rope had come off. It just didn't seem dangerous to you?

A. After I picked the load, like I said, I surveyed it and we looked at it and everything seemed fine, so we held it there.

The question of the amount of danger existing as the load was held twelve to fifteen feet above Santos, and his fellow workmen, is crucial to any resolution of the case. It is a factual question for the jury. The winch driver testified at page 55 of his deposition, in response to a question as to whether it was dangerous to work under the suspended load, as follows:

> I wouldn't say that, I won't say it is unsafe for the men to be picking up the sacks when I was picking the load up, keeping the load visually where I could see fifteen feet, roughly, above their heads.

Additional testimony concerning the amount of danger and the perception of the workmen is contained at R. Hawran Dep. 56; R. Botler Dep. 14, 37 and 50.

> Whether due care under all the circumstances was observed by the present shipowner at the relevant times and to what proportionate extent, if any, Van Horn was at fault are clearly questions for jury determination after a full trial. See *Pope & Talbot v. Hawn,* 346 U.S. 406, 74 S. Ct. 202, 98 L.Ed. 143 (1953). As the noted admiralty text authors, Gilmore and Black, observe regarding negligence under the Jones Act [i]t would be a rare court in an unusual case which would take the negligence issue away from the jury. . . ." Gilmore and Black, *The Law of Admiralty,* 311 (1957). The same principle should be applicable under the general maritime concept of negligence. As a result, we hold that the lower court erred in taking this case from the jury and deciding as a matter of law that Gatco was not negligent.
> We therefore remand the case for trial on the negligence and contributory negligence issues, while affirming the district court's action on the unseaworthiness claim.

Santos testified that he believed it was his duty to clean up the spill and once he set upon cleaning it up he was in no position to watch the load over his head (R. Santos Dep. 41, 42, 43, 50). At page 60 of his deposition, Santos testified that the only problem he knew about with the gear was that it was "jumpy." It was only later, and after the accident, that he found out from the winch driver that the brake on the winch was slipping and would not hold the load (R. Santos Dep. 62).

A jury should have been allowed to find precisely what Santos knew about his situation in the hold as he was cleaning up the sacks of flour and precisely what appreciation he had of the amount of danger that confronted him. Whether Santos had a reasonable alternative to his clean-up activities was a jury question. A jury should have been permitted to find whether the jumpiness of the winch had any part to play in this accident. A jury should have been permitted to find whether the defective brakes which allowed the winch to slip when in the stop position had

any part to play in his accident.[8]

The district court found that the "alleged defective condition of the winch had only a remote cause-in-fact relationship to the accident and could not have been the proximate cause of the accident."[9]

Typically, the questions of negligence, contributory negligence, and proximate cause are jury questions. The "finding" of lack of proximate cause by the district court is surprising when one examines portions of the testimony which indicate that the load, as it was held, appeared to be stable, but it was only the brake failing to hold that caused the load to loosen and slip and fall upon the plaintiff. A winch with proper brakes would not have allowed the load to slip. (R. Hawran Dep. 12, 13, 16, 17). The district court's "finding" on proximate cause seemed to be based on the court's feeling that the stevedores' negligence intervened and cut off any negligence of the shipowner.

The Fifth Circuit was faced with the same type of proximate cause argument in *In the Matter of the Complaint of Dearborn Marine Service, Inc., et al., For Exoneration From or Limitation of Liability of the Oil Screw Carryback*, 499 F.2d 263, 279 (5th Cir. 1974), *pet. for rehearing den.*, 512 F.2d 1061. The court said at 279:

> We also reject Dearborn's contention that *Carryback*, by being moored too close to the platform, merely created a condition on which intervening neg-

8. The evidence was clear that it was the slipping of the brake on the winch that caused the sacks to fall on the plaintiff, not the jumpiness of the winch. The jumpiness of the winch was significant only in the hatch tender's decision as to whether the load would be taken out to the dock and then returned to the hold after the mess had been cleaned up. A jury could find that the jumpiness of the winch was not the proximate cause of Santos' injury. A jury could find that under the circumstances existing in the hold of the ship, Santos was not in any degree responsible for his own accident. These and other questions which could be hypothesized are classical (fact) jury questions.

9. Appendix A, Petition for Writ of Certiorari, p. A-6, District Court's Memorandum and Order Granting Summary Judgment of Dismissal.

ligence forces of others acted and was not itself a proximate cause of the deaths in issue. This theory of proximate causation, now almost universally rejected, in admiralty as elsewhere, is an argument "grow[ing] out of the discredited notion that only the last wrongful act can be a cause—a notion as faulty in logic as it is wanting in fairness." *In re Kinsman Transit Co.*, 338 F.2d 708, 719 (CA 2 1964), *cert. den. sub nom. Continental Grain Co. v. City of Buffalo*, 380 U.S. 944, 85 S.Ct. 1026, 13 L. Ed. 2d 963 (1965). The correct rule is that actionable negligence may consist of failure to take precautions against forseeable acts of third persons, and this rule applies though the conduct of the third person is itself negligent. Restatement 2d, Torts §§ 302, 302A; *Transcontinental Gas Pipe Line Corp. v. Mobil Drilling Barge*, 424 F.2d 684, 689 (CA 5), *cert. den. sub nom. Ocean Drilling & Exp. Co. v. Signal Oil and Gas Co.*, 400 U.S. 832, 91 S.Ct. 65, 27 L.Ed.2d 64 (1970); *Horton & Horton, Inc. v. T/S J. E. Dyer*, 428 F.2d 1131 (CA 5., 1970), *cert. denied*, 400 U.S. 993, 91 S. Ct. 461, 27 L.Ed.2d 441 (1971); Harper & James, *Law of Torts* §20.05, at 1144 n. 34 (1956). *See also* Restatement 2d, Torts §449.

The conclusion that Dearborn was negligent must be affirmed.

Proximate cause is not destroyed merely because plaintiff may also have contributed to his own injury. *Spinks v. Chevron Oil Co.*, 507 F.2d 216, 221 (5th Cir. 1975).

If Santos were found by a jury to have been guilty of some negligence, a jury could also have found that the failure of the shipowner to take precautions (by repairing the winch) against foreseeable acts of third persons was negligence. Santos' only real alternative to doing his job as he did, assuming he had enough knowledge to make such a decision, may have been refusal to continue, with all of its repercussions. *Napoli v. Hellenic Lines, Ltd.*, 536 F.2d 505, 509 (2d Cir. 1976); *Davis v. Inca Comp. Naviera*, 440 F. Supp. 448, 452 (W.D. Wash. 1977). Thus, how much negligence, if any, was Santos' responsibility should have been submitted to the jury.

C. The 1972 Amendments to the Longshoremen's and Harbor Workers Compensation Act Have Not Substituted Assumption of Risk and Contributory Negligence Principles for Comparative Negligence Principles

The district court found that "the manner in which the accident occurred, the fact that plaintiff's activities were so dangerous and the fact that plaintiff undertook his actions free from any direction by the defendant while recognizing that the circumstances were so dangerous, is such that the defendant cannot be held liable as a matter of law."[10]

Thus, the essential and overwhelming thrust of the Memorandum and Order Granting Summary Judgment was that Santos was fully aware of the specific risk involved in working as he was working at the time of his injury, and that he voluntarily accepted that risk. The words "assumption of the risk" were never used in the district court's decision, but, it is submitted, that there can be no doubt, the court held as a matter of law, that Santos assumed the risk of his own injury. The court seemed to say that the changes in the Act necessitated this result. The appellate court held that the district court was in error in invoking §343 and §343A of the Restatement (Second) of Torts to the extent that they placed limitations on the shipowner's liability inconsistent with Congress' explicit direction to reject the defenses of contributory negligence and assumption of risk.

Clearly, the amendments did not change the maritime rules concerning assumption of risk and comparative negligence.[11] The shipowner, in essence, has argued that Santos may not recover as a matter of law because the faulty

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10. *Id.* at A-5, A-6.

11. Robertson, Negligence Actions by Longshoremen Against Shipowners Under the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act, 7 Journal of Maritime Law and Commerce 447, 474 (1976).

condition of the winch was at all times known to him, that it was open and obvious, and that he voluntarily subjected himself to the risk of injury. The district court essentially adopted that view. The statutory section involved, 33 U.S.C. §905(b), clearly provides that an injury caused by the negligence of a vessel gives rise to a cause of action against the vessel. There is no mention in the amendments of any change which would substitute assumption of the risk principles for the former comparative negligence principles. The law on this subject remains the same as stated by this Court in *Socony-Vacuum Oil Co. v. Smith*, 305 U.S. 424, 431 (1939).

It has been the law for decades that in a trial of a case of maritime tort on navigable waters, the maritime rule of comparative negligence rather than the common law rule of contributory negligence will prevail. *Pope & Talbot, Inc., v. Hawn*, 346 U.S. 406, 409 (1954); *Garrett v. Moore-McCormack Co.*, 317 U.S. 239, 243 (1949); *The Max Morris*, 137 U.S. 1, 14 (1890).

To eliminate any doubt that Congress intended no change in the application of assumption of risk and comparative negligence, the committee reports state:

> Finally, the Committee does not intend that the negligence remedy authorized in the bill shall be applied differently at different ports depending on the law of the state in which the port may be located. The Committee intends the legal questions which may arise in actions brought under these provisions of the law shall be determined as a matter of federal law. In that connection, *the Committee intends that the admiralty concept of comparative negligence, rather than the common law rule as to contributory negligence, shall apply* in cases where the injured employee's own negligence may have contributed to causing the injury. Also, *the Committee intends that the admiralty rule which precludes the defense of*

> *"assumption of risk"* in an action by an injured employee shall also be applicable.

(Emphasis added). Appendix A-12.

The district court erred because it incorporated the substance of the defenses of contributory negligence and assumption of risk as contained in §§343 and 343A. The sections and comments are permeated with the forbidden concepts.[12] Thus, comment e. to §343 states:

> In the ordinary case, an invitee who enters land is entitled to nothing more than knowledge of the conditions and dangers he will encounter if he comes. If he knows the actual conditions, and the activities carried on, and the dangers involved in either, *he is free to make an intelligent choice as to whether the advantage to be gained is sufficient to justify him in incurring the risk by entering or remaining on the* land. The possessor of the land may reasonably assume that he will protect himself by the exercise of ordinary care, *or that he will voluntarily assume the risk of harm* if he does not succeed in doing so. Reasonable care on the part of the possessor therefore does not ordinarily require precautions or even warning, against dangers which are known to the visitor, or so obvious to him that he may be expected to discover them.

(Emphasis added) *See also,* §343 comments b, d and §343A comment d (Appendix II).

Most courts that adopted §§343 and 343A did not refer to the conflict between the sections and the congressional mandate to exclude defenses of assumption of risk and contributory negligence. *Clemons v. Mitsui O.S.K. Lines, Ltd.,* 596 F.2d 746 (7th Cir. 1979); *Anuszewski v. Dynamic Mariners,* 540 F.2d 757 (4th Cir. 1976); *Croshaw v. Koninklijke Ned Lloyd, B.V. Rijswijk,* 398 F. Supp. 1224 (D. Ore. 1975); *Ramirez v. Toko Kaium K.K.,* 385 F. Supp. 644 (N.D. Cal. 1974).

12. The sections and comments are attached hereto as Appendix II.

Other courts sought to reconcile §§343 and 343A with the congressional mandate by using cautionary language to assure that they were aware of the conflict, *Napoli, supra* at 536 F.2d 508 (2d Cir. 1976); *Gay v. Ocean Transport and Trading Ltd.*, 546 F.2d 1233, 1241 (5th Cir. 1977).

In *Napoli, supra*, the appellate court reversed a jury verdict in favor of the defendant, shipowner, and remanded for a new trial. The court criticized the jury instructions at 536 F.2d 508:

> Moreover, we do not think that instructions which flatly negate the duty to protect against obvious danger properly portray the present-day obligations owed by a landowner to one whom he invites upon his premises. . . .
>
> *Where dangers are unreasonable, their obviousness, standing alone, should not necessarily relieve a defendant of all responsibility for their presence.* Although the invitee (or in this case the employee) may be under a duty to avoid harm likely to result to him from open and obvious dangers, *he may not be in a position fully to appreciate the risk or* to avoid the danger even *though aware of it.* . . .
>
> *Moreover, the traditional rule, while generally phrased in terms of negligence, is really a commingling of the doctrines of negligence, contributory negligence and assumption of risk. Where, as in this case, the doctrine of comparative negligence is observed and assumption of risk is not a defense, the arguments in support of the rule lose much of their cogency.*

(Emphasis added)

In the instant case, the jury could find that Santos was not aware of the precise danger which injured him, that the vessel owner might reasonably anticipate that Santos would do his job despite any obvious danger (if the fact-finder found it obvious) since his only alternative would be to leave his job or face trouble for delaying the work, that any negligence of Santos was only a concurring cause

with the shipowner's negligence and therefore comparative negligence could apply.

Thus, began the attempts by the courts to apply premises liability approaches to a longshoreman's negligence action against a shipowner and, at the same time, to steer clear of assumption of risk and contributory negligence defenses. The courts have been unsuccessful in their attempt. Comments, "Section 905(b) and A Standard of Negligence: Cosmos or Chaos,?" 4 The Mar. Law. 305 (1979), points out the confusion, chaos and irreconcilability of the cases which rely too heavily on §§343 and 343A, and advocates the adoption of the *Santos* standard in all other jurisdictions. The cases from the Second Circuit since *Napoli* demonstrate the confusion and irreconcilability. *Canizzo v. Farrell Lines, Inc.*, 579 F.2d 682 (2d Cir. 1978), *cert. denied*, 439 U.S. 929 (1978); *Lurbrano v. Royal Netherlands*, 572 F.2d 364 (2d Cir. 1978); *Cox v. Flota Mercante Grancolombiana*, S.A., 577 F.2d 798 (2d Cir. 1978), *cert. denied*, 439 U.S. 881 (1978); *Lopez v. A/S D/S Svendborg*, 581 F.2d 319 (2d Cir. 1978). In *Lopez*, the court said at 326: "This case also will fall within what seems to be rapidly becoming an overly complex and unpredictable body of law."

The Seventh Circuit steers an uncertain and irreconcilable course in the cases of *Matthews v. Ernest Russ S.S. Co.*, 603 F.2d 676 (7th Cir. 1979) and *Clemons v. Mitsui O.S.K. Lines Ltd.*, 596 F.2d 746 (7th Cir. 1979).

The Fourth Circuit cases of *Anuszewski v. Dynamic Mariners Corp.*, 540 F.2d 757 (4th Cir. 1976) and *Chavis v. Finnlines Ltd.*, 576 F.2d 1072 (4th Cir. 1978) point up the same irreconcilable conflict between barring a longshoreman from recovery because he exposed himself to an open and obvious danger, on one hand, and allowing the jury to be instructed that a shipowner owed the longshoreman the duty to exercise ordinary care under the circumstances to keep the premises in a reasonably safe

condition for longshoremen working aboard, on the other. The conflict is created by applying premises liability principles to negligence actions while at the same time attempting to keep assumption of risk and contributory negligence from barring recovery.

The court in *Gay, supra,* expressed the same concern concerning assumption of risk and contributory negligence as follows at 546 F.2d 1241:

> *The more telling criticism of the traditional rule, however, is that it is premised in large part upon the concepts of contributory negligence and assumption of risk. As previously recounted both these concepts are inappropriate in §905(b) cases. It would be wholly improper then indirectly to introduce these principles into LHWCA suits by adopting the traditional rule that if a hazard is open and obvious that fact alone absolves the owner of his negligence.*

(Emhasis added)

The Fifth Circuit made it clear in *Gay,* above, that it would not allow "assumption of risk" or "contributory negligence" defenses to enter into longshore personal injury cases under the guise of "open and obvious" danger obviating any duty on the part of the shipowner.

It is submitted that the district court applied assumption of risk to the Santos cause of action in its judgment of dismissal on the motion for summary judgment. The judgment, therefore, was in error. A reasonable fact-finder could conclude that a man in the position of the plaintiff, Lauro De Los Santos, had no realistic or reasonable way of protecting himself against the dangerous, malfunctioning winch. He was merely doing the job he felt was expected of him at the time of his accident. Santos was at the bottom of the chain of work command and had no power to alter the work methods. He had no authority to repair the malfunctioning winch. There was no evidence that Santos had the power or ability to devise a better or safer method of doing the work. Thus, whether

Lauro De Los Santos acted reasonably under the circumstances was a question of fact for the jury under proper instruction. Indeed, 29 C.F.R. §1918.53(c)(2) denies the longshore crew the right to "tamper with or adjust electric control circuits" of electric winches. The shipowner certainly maintained control over the repair of the winches in this case. The observation of the circuit court is thus well-taken that "[f]rom the record before us, it is not at all clear that the shipowner did not maintain ultimate control over the ship and its gear during the loading. Far from concluding that *only* the stevedore could have had the defective winch repaired, we cannot be certain from the record that the stevedore had *any* authority to repair it." *Santos,* 598 F.2d at 490.

The contrast between the decisions of Judge Orrick in the cases of *Ramirez v. Toko Kaium K.K.,* 385 F. Supp. 644 (N.D. Cal. 1974), and *Gallardo v. Westfal-Larsen & Co. A/S.,* 435 F. Supp. 484 (N.D. Cal. 1977) is also instructive. The court discussed the use of §§343 and 343A in *Gallardo, supra,* at page 494:

> No matter whether courts use Sections 343 and 343A alone or together, the *references to rules of real property tort law conflict with the intent of Congress expressed in the House Report.* For example, the *Restatement* sections *force courts to define a shipowner's standard of care under the amendments in terms of the plaintiff's perceptions of the danger posed by a given condition. The sections thus tend to foreclose a balanced inquiry into the reasonableness of a vessel's conduct under the circumstances of a particular case and tend to limit the liability of shipowners for their proven negligence. See, e.g., Anuszewski v. Dynamic Mariners Corp., Panama,* 391 F. Supp. 1143, 1145 (D. Md. 1975). The amendments, of course, permit limitations upon a plaintiff's recovery based upon the admiralty doctrine of comparative negligence. However, *the amendments specifically reject any bar to recovery based upon contributory negligence and assumption of risk.* Yet, the

authors of the *Restatement* clearly indicate that the contributory negligence of the plaintiff and assumption of risk have a direct bearing upon liability under Sections 343 and 343A. *Restatement (Second) of Torts* §343, comment d; *id.* §343A, comment d. The authors also state that whether or not courts conceive of a plaintiff's perceptions of a hazardous condition as relieving a defendant of proven liability or of preventing a finding of liability altogether, the effect of either analysis is the same. *Id.* §496C, comment d. Defendants receive the benefit of a partial or absolute bar to liability having the characteristics of a defense based upon an implied assumption of risk.

The development of a body of precedent which focuses upon the perceptions of the plaintiff has more than theoretical importance. Reported cases already contain examples of plaintiffs who were not permitted to compare their personal negligence against the negligence of their opponents. *See Anuszewski v. Dynamic Mariners Corp. Panama, supra,* 391 F. Supp. at 1145; *Frasca v. Prudential-Grace Lines, Inc., supra,* 394 F. Supp. at 1101-02. *Furthermore, the "shield" afforded by the Restatement sections reduces incentives to remedy dangerous conditions and thus conflicts with the Congressional intent to promote safety in the longshoring industry.* House Report, reprinted in 3 U.S. Cong. & Adm. News, *supra,* at 4705. Lastly, a search for an appropriate standard of care for shipowners under the amendments among tort concepts which emerged from a common law classification system of diminishing importance makes little practical sense. The Supreme Court has discussed absorption of common law precedent concerning the duties of real property owners toward persons on their land into the law of admiralty and has flatly condemned the effort. See *Kermarec v. Compagnie Generale Transatlantique,* 358 U.S. 625 (1959).

(Emphasis added)

With reference to the question of control, the court stated at page 495:

However, analysis based upon retention or relinquish-

> ment of control poses a potential for abuse by courts which view the commencement of cargo operations as extinguishing the liability of vessels for injuries subsequently sustained by longshoremen. See, *e.g., Frasca v. Prudential-Grace Lines, Inc., supra,* 394 F. Supp. at 1101-02 (duration of stevedore's control absolved shipowner of negligence in providing an unsafe place to work). Furthermore, reliance on rules respecting the duties of contractors and subcontractors has the potential of introducing complex common law concepts into admiralty law and thus invoking the same criticisms raised above in the discussion of invitees on real property. *Federal courts should, therefore, avoid reference to principles of control as a substitute for a thorough investigation of the reasonableness of conduct under given circumstances. See generally The Injured Longshoreman, supra,* 28 Hastings L.J. at 788-90.

(Emphasis added)

The logical result of the lack of the "balanced inquiry into the reasonableness of a vessel's conduct under the circumstances of a particular case" which Judge Orrick warned about above, is seen demonstrably in the case of *Wiles v. Delta Steamship Lines,* 1976 A.M.C., 2646 (E.D. La., 1976). In that case, the trial court, sitting as the finder of the fact, found that approximately three weeks prior to the injury, a rung of the ladder had been knocked off during cargo operations in Africa. Both the ship's captain and the chief mate were aware of the incident and that the rung was missing. Repairs for the ladder were scheduled. No warning of the missing rung on the hatch ladder was given to the injured longshoreman and he was unaware of the condition of the ladder. As he climbed down the ladder, he lost his grip at the missing rung and fell to the bottom of the hold sustaining injuries. The court applied the following rule at 1976 A.M.C. 2649.

> Under the 1972 amendments to the Longshoremen's and Harbor Workers Compensation Act (LHWCA), this action is governed by the same law of negligence

as applies to the relationship between an owner of land and an independent contractor/business invitee. See 33 U.S. Code, sec. 905(b); 1972 U.S. Code & Admin. News, pp. 4703-04; *Fedison v. Vessel Wislica,* 1974 AMC 1967, 382 F. Supp. 4, 6-7 (E.D. La., 1974). The pertinent principles have been summarized as follows:

> The owner of a premise [vessel] who contracts with an independent contractor (business invitee) to perform services for the owner upon the owner's premises owes a duty to the independent contractor and his employees to exercise reasonable care to have the premise in a reasonably safe condition for use by the independent contractor and to give said contractor warning of any concealed or latent defects that are known by the owner and not by the independent contractor. The owner of a premise is under no duty to warn the independent contractor or his employees of dangers or open and obvious defects which are known to the independent contractor or his employees or which could be readily observed by said employees in the exercise of ordinary care.

See *Hite v. Maritime Overseas Co.,* 1974 AMC 1274, 1279, 380 F. Supp. 222, 226 (E.D. Tex., 1974) and cases cited therein. See also *Cummings v. "Sidarma" Soc.,* 409 F. Supp. 869, 871-72 (E.D. La., 1976); *Fitzgerald v. Compania Naviera La Molinera,* 1976 AMC 739, 394 F. Supp. 413, 415 (E.D. La., 1975).

The trial court found that from an area across the main deck looking toward the ladder, the missing tenth rung would have been clearly visible to the longshoremen, and, therefore, "the defendant owed no duty to notify plaintiff of a defective ladder that readily could have been observed in the exercise of reasonable care." 1976 A.M.C., at 2653. The court, therefore, barred the plaintiff from recovery even though the shipowner was manifestly negligent.

The Fifth Circuit reversed at 574 F.2d 1338 (5th Cir. 1978) in a *per curiam* decision which cited *Gay, supra.*

The court pointed to §343A, the admiralty rule of comparative negligence, and the primary question of whether the vessel owner was negligent. Although the court did not refer to the antithesis between the restatement sections and the prohibition against use of assumption of risk and contributory negligence, the court strongly advocates the more balanced inquiry advocated in *Gallardo, supra.* The lack of discussion does nothing to reconcile the use of §§343 and 343A with congressional prohibitions against assumption of risk and contributory negligence.

Finally, other courts have held that the inclusion of §§343 and 343A in a longshoreman's negligence action against a shipowner embodied the forbidden concepts of assumption of risk and contributory negligence and, therefore, were inapropriate. *Johnson v. A/S Ivarans Rederi,* 613 F.2d 334, 347 (1st Cir. 1980); *Griffith v. Wheeling-Pittsburgh Steel Corp.,* 610 F.2d 116, 125 (3d Cir. 1979); *Santos,* 598 F.2d at 490; *Brown v. Ivarans Rederi A/S,* 545 F.2d 854, 863 (3d Cir. 1976); *Shepler v. Weyerhaeuser Company,* 279 Or. 477, 569 P.2d 1040, 1050 (Or. 1977), *cert. denied,* 434 U.S. 1051.

Thus, the courts that have most recently examined the developing case law have concluded that any incorporation of the substance of the defenses of contributory negligence and assumption of the risk through §§343 and 343A of the Restatement is error. Further, that the cited sections are so permeated with assumption of risk and contributory negligence concepts that the proper approach to a trial of a case such as the one at bar is to apply the test stated in this case at 485:

> A vessel is subject to liability for injuries to longshoremen working on or near the vessel caused by conditions on the vessel if, but only if, the shipowner
>
> (a) Knows of, or by the exercise of reasonable care would discover, the condition, and should real-

ize that it involves an unreasonable risk of harm to such longshoremen, and

(b) The shpowner fails to exercise reasonable care under the circumstances to protect the longshoreman against the danger.

Griffith, supra; Johnson, supra.[13] The test adopted by these courts is supported by, and patterned after, this Court's decision in *Kermarec, supra,* wherein this Court said at 630:

> It is a settled principle of maritime law that a shipowner owes the duty of exercising reasonable care towards those lawfully aboard the vessel who are not members of the crew. . . .
>
> The distinctions which the common law draws between licensee and invitee were inherited from a cultured deeply rooted to the land, a culture which traced many of its standards to a heritage of feudalism. In an effort to do justice in an industrialized urban society, with its complex economic and individual relationships, modern common-law courts have found it necessary to formulate increasingly subtle verbal refinements, to create subclassifications among traditional common-law categories, and to delineate fine graduations in the standards of care which the landowner owes to each. Yet even within a single jurisdiction, the classifications and subclassifications bred by the common law have produced confusion and conflict. As new distinctions have been spawned, older ones have become obscured. *Through this semantic morass the common law has moved, unevenly and with hesitation towards "imposing on owners and occupiers a single duty of reasonable care in all the circumstances."*

For the admiralty law at this late date to import such conceptual distinctions would be foreign to its

13. The standard is in accord with traditional negligence concepts. W. Prosser, Handbook of the Law of Torts, §§32 p.151 (4th ed. 1971); Fleming, The Law of Torts, 111 (3rd ed. 1965). The standard is consistent with congressional intent expressed in the oil spill example that a shipowner should exert "reasonable care . . . under the circumstances" Appendix A-10; *Shepler v. Weyerhaeuser, supra,* at 569 P.2d 1047.

> traditions of simplicity and practicality. . . . *We hold that the owner of a ship in navigable waters owes to all who are on board for purposes not inimical to his legitimate interests the duty of exercising reasonable care under the circumstances of each case.*

(Emphasis added) *Accord, Federal Marine Terminals Inc. v. Burnside Shipping Co.*, 394 U.S. 404, 416 (1969)

It would be anomalous, indeed, if the maritime law, after generations of rejecting assumption of risk principles, would suddenly adopt such a doctrine at precisely the same time the common law of premises liability is evolving toward the elimination of the doctrine through the elimination of status designations. The modern trend of premises liability is toward the view that a landowner owes reasonable care to anyone lawfully on his premises. *Rowland v. Christian*, 69 Cal.2d 108, 70 Cal. Rptr. 97, 443 P.2d 561 (1968); Annot., 32 A.L.R. 3d 508 (1970), "Modern Status of Rules Conditioning Landowner's Liability Upon Status of Injured Party as Invitee, Licensee, or Trespasser"; *Webb v. City and Borough of Sitka*, 561 P.2d 731 (Alas. 1977); *Cates v. Beauregard Electric Cooperative, Inc.*, 328 So. 2d 367 (La. 1976), *cert. denied*, 429 U.S. 833 (1976); *O'Leary v. Coenen*, 251 N.W.2d 746 (N.D. 1977); *Mounsey v. Ellard*, 363 Mass. 693, 297 N.E. 2d 43 (Mass. 1973).

D. Negligence-Concurrent Negligence-Comparative Negligence

The negligence, if any, a jury might find, of a fellow servant of Santos, should not be a bar to recovery. *Edmonds, supra*, 443 U.S. 265, 266; *International Stevedoring Co. v. Haverty*, 272 U.S. 50, 47 S. Ct. 19 (1926); *Griffith, supra*, 610 F.2d 124; *Santos at* 598 F.2d 489, 490.

In the case at bar, the jury could find that the shipowner was negligent in allowing the winch to remain faulty for almost three full work days, but could also find that the winch driver and/or hatch tender and/or Santos and/or

his employer were somewhat negligent also. It is a factual question whether the negligence of Santos, Santo's employer, Santos' fellow workmen or the shipowner solely or concurrently caused the injuries. The shipowner cannot avoid liability by pointing to the fact that there was a concurrent duty upon the plaintiff's employer to refrain from negligent actions. *Lopez v. A/S D/S Svendborg*, 581 F.2d 319, 324 (2d Cir. 1978); *Landon v. Lief Hoegh and Co.*, 521 F.2d 756, 763 (2d Cir. 1975). An injured longshoreman cannot be vicariously responsible or negligent because of the negligence of the stevedore employer or a fellow workman. *Marant v. Farrell Lines*, 550 F.2d 142, 151 (3d Cir. 1977); *Griffith supra*, at 610 F.2d 124.[14]

This Court has recently spoken on the question of concurrent negligence in the *Edmonds* case, *supra*, at 443 U.S. 259:

> As that law had evolved by 1972, a longshoreman's award in a suit against a negligent shipowner would be reduced by that portion of the damages assignable to the longshoreman's own negligence; but, as a matter of maritime tort law, the shipowner would be responsible to the longshoreman in full for the remainder, even if the stevedore's negligence contributed to the injuries. This latter rule is in accord with the common law, which allows an injured party to sue a tortfeasor for the full amount of damages for an indivisible injury that the tortfeasor's negligence was a substantial factor in causing, even if the concurrent negligence of others contributed to the incident.

The clear message from the case and the authorities

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14. The court in *Griffith* said at 124:

"The proposed rule thus imputes to the non-negligent longshoreman the negligence of his stevedore employer, and establishes that negligence as a complete bar to recovery against the vessel. This result is at variance with the Supreme Court's interpretation of the 1972 Amendments in *Edmonds v. Compagnie Generale Transatlantique, supra.* It is inconceivable to us that the Court, which disapproved a rule that imputes the negligence of the stevedore to the longshoreman to *reduce* his recovery against a negligent shipowner, would approve a rule baring all recovery against a negligent shipowner on the basis of imputed employer negligence."

cited is that where there is evidence of negligence of several parties, one of whom is the shipowner, the longshoreman has the right of recovery against the shipowner, with a reduction in his award for the proportion of his *own personal, contributory negligence only*. The longshoreman does not have to show the shipowner *solely* responsible in order to recover on a negligence cause of action. It is axiomatic, there can be more than one proximate cause of an injury.[15] The circuit court herein observed at 598 F.2d 489:

> Thus, the contributory negligence of the longshoreman's employer or fellow longshoreman will not preclude or diminish recovery through a theory of imputed contributory negligence. It is the longshoreman's own negligence that will reduce his recovery from the negligent vessel.

E. Safe Place To Work — Dangerous Conditions

The legislative reports refer to the duties of the shipowner:

> Permitting actions against the vessel based on negligence will meet the objective of encouraging safety because the vessel will still be required *to exercise the same care as a land-based person in providing a safe place to work. Thus, nothing in this bill is intended to derogate from the vessel's responsibility to take appropriate corrective action where it knows or should have known about a dangerous condition.*
>
> So, for example, where a longshoreman slips on a vessel's deck and is injured, the proposed amendments to Section 5 *would still permit an action against the vessel for negligence. To recover he must establish that*: 1) *the vessel put the foreign substance on the*

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15. 3 E. Devitt and C. Blackmar, Federal Jury Practice and Instructions, §80.19, p. 29 (3rd Ed. 1977); 6 Washington Practice, Washington Pattern Jury Instructions, Civil, (1967), W.P.I. 15.01; 57 Am. Jur. 2d §176 p. 542 (2d ed. 1971); *Spinks v. Chevron Oil Co.*, 507 F.2d 216 (5th Cir. 1975); *Bender v. Dingworth*, 425 F.2d 378 (5th Cir. 1970); *Miller Adm. v. Union Pacific R. Co.*, 290 U.S. 227 (1933); W. Prosser, Handbook of the Law of Torts 239 (4th ed. 1971).

> *deck, or knew that it was there, and willfully or negligently failed to remove it; or 2) the foreign substance had been on the deck for such a period of time that it should have been discovered and removed by the vessel in the exercise of reasonable care by the vessel under the circumstances.* The vessel will not be chargeable with the negligence of the stevedore or employees of the stevedore.

(Emphasis added). Appendix I-10. Santos contended that the shipowner was negligent for failing to furnish him with a safe place to work. Cases which recognize that a shipowner is required to exercise reasonable care under the circumstances to furnish the longshoreman with a safe place to work are: *Migut v. Hyman-Michaels Co.*, 571 F.2d 352, 356 (6th Cir. 1978); *Hess v. Upper Mississippi Towing Corp.*, 559 F.2d 1030, 1033 (5th Cir. 1977); *Napoli v. Hellenic Lines Ltd.*, 536 F.2d 505, 507 (2d Cir. 1976); *Brown v. Ivarans Rederi A/S*, 545 F.2d 854, 860 (3d Cir. 1976); *Van Horn v. Gulf Atlantic Towing Corp.*, 388 F.2d 636, 638 (4th Cir. 1968); *White v. United States*, 400 F.2d 74, 76 (4th Cir. 1968); *Solsvik v. Maremar Compania Naviera, S.A.*, 399 F. Supp. 712, 715 (W.D. Wash. 1975); *Slaughter v. Ronde*, 390 F. Supp. 637, 645 (S.D. Ga. 1974), *aff'd per curiam*, 509 F.2d 973 (5th Cir. 1975); *Shepler v. Weyerhaeuser Co.*, 279 Or. 477, 569 P.2d 1040, 1056 (Or. 1977); *Cf., West v. United States*, 361 U.S. 118, 123 (1959).

The committee reports made it very clear that nothing was to "derogate from the vessel's responsibility to take appropriate corrective action where it knows or should have known about a dangerous condition." Thus, actions were permitted against the vessel to encourage safety. It is ironic that since the amendments, the courts applying the "open and obvious danger" approach seem to hold that the more dangerous a ship is, and the more obvious that danger is, the less likely it is that a shipowner can be held responsible for a longshoreman's injuries. Surely, Congress did not intend to encourage shipowners to ignore danger-

ous conditions aboard their ships, and yet this was precisely the impact of the holding of the district court in this case.

The circuit court's decision restores the dual safety obligations of the shipowner and stevedore as Congress intended. A shipowner is not absolved from his responsibilities simply by pointing at an alleged failure of another actor. The negligence of all the actors must be weighed and evaluated just as Congress intended. Thus, the practical and simple approach of the Ninth Circuit in this case is the best means to accomplish the intent of Congress.

F. Argument In Response To Petitioner's Brief

Petitioner argues that reference to the *Albanese* case[16] in the committee reports was a comment on the negligence cause of action which was retained after the amendments.

The argument is fallacious because the citation of the *Albanese* case in the legislative history does not refer to negligence, but rather to the abolition of unseaworthiness. The reports explicitly denied comment on the negligence remedy.[17]

The requirement for actual notice of any danger as urged by petitioner would fly in the face of the committee reports that state "nothing in this bill is intended to derogate from the vessel's responsibility to take appropriate action where it knows *or should have known about a dangerous condition.*" Appendix I-10.

The petitioner argues that a great number of premises liability cases should be looked to to limit the duty of the shipowner by the limitations in §§343 and 343A of the

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16. *Albanese v. N/V Nederl. Amerik Stomov. Maats,* 346 F.2d 481 (2d Cir.), *rev'd per curiam,* 382 U.S. 283, 15 L.Ed. 327, 86 S.Ct. 429, *reh. den.,* 382 U.S. 1000, 15 L.Ed.2d 490, 86 S.Ct. 534 (1965).

17. *This listing of cases is not intended to reflect a judgment as to whether recovery on a particular actual setting could be predicated on the vessel's negligence.* (Emphasis added) (Appendix I-10).

Restatement (Second) of Torts. The answer to this argument is contained at Section C of this brief.

Petitioner argues that other sections of the restatement should be applied. At no point in this case, until petitioner's brief, has anyone suggested the application of the other restatement sections (§§409-415). To the extent that these sections exonerate a shipowner from responsibility for his own negligence, they are clearly in conflict with the legislative intent.[18] The shipowner, under these sections would simply not be vicariously liable for the negligence of the stevedore. Nor is the shipowner vicariously liable under the test applied by the Ninth Circuit. Santos alleged and proved in a preliminary fashion the independent negligence of the shipowner.

Petitioner's brief, and Section II, in particular, is based on the assumption that the shipowner was "minimally" and "remotely" responsible and the stevedore employer was "better able to make that decision [concerning the winch] than the shipowner." The petitioner assumes that the shipowner has been "minimally" responsible and the stevedore company has been "greatly at fault." This approach permeates the brief of petitioner and petitioner's amicus brief. This approach is a subversion of the jury's function of fact finding. The relative knowledge, control, and fault of the actors is for the jury. The determination cannot be made by petitioner in his brief anymore than by the district court in a motion for summary judgment.

Petitioner argues that safety considerations are not promoted by the rule adopted by the court of appeals, but the

18. "Furthermore, reliance on rules respecting the duties of contractors and subcontractors has the potential of introducing complex common law concepts into admiralty law and thus invoking the same criticisms raised above in the discussion of invitees on real property. Federal courts should, therefore, avoid reference to principles of control as a substitute for a thorough investigation of the reasonableness of conduct under given circumstances. *See generally The Injured Longshoreman, supra,* 28 Hastings L.J. at 788-90." *Gallardo, supra,* 435 F. Supp. at 495.

rule it suggests would insulate the shipowner from all liability in cases in which the "control" is in the stevedore company or dangers are "open and obvious."

An article in 28 Hastings L. J., 771 (1977), Note, "The Injured Longshoreman v. The Shipowner after 1972: Business Invitees, Land-based Standards, and Assumption of Risk," states at 772:

> The business invitee standard, however, defines the vessel's duty in terms of the plaintiff's perception, frequently preventing inquiry into the reasonableness of the vessel's conduct. *Thus, the standards not only fails to encourage the vessel to take remedial action, but also contravenes the comparative negligence policy of balancing relative fault of all of the parties involved.* Moreover, the business invitee standard incorporates the defense of assumption of risk which the legislative history expressly abolished.

(Emphasis added). Further, incorporation of assumption of risk into the definition of the shipowner's duty requires the longshoreman to bear the burden of proving that he did not assume the risk. *See* "The Injured Longshoreman," *supra,* at 781.

The petitioner's approach does not promote safety but simply immunizes the shipowner from any possibility of liability.

The court in *Galardo, supra,* at 435 Fed. Supp. 494, concluded that the restatement sections reduced the shipowner's "incentives to remedy dangerous conditions," and, therefore, conflicted with congressional intent to promote safety in the longshoring industry. The circuit court in this case stated that the standard it adopted "will promote safety within a comparative negligence framework while avoiding both liability without fault and the defenses of contributory negligence and assumption of risk." *Santos* at 498 F.2d 486. *See also, Landon v. Lief Hoegh & Co.,* 521 F.2d 756, 763 (2d Cir. 1975). Congress unequivocally

stated that it believed that the preservation of the negligence action would promote safety. It said:

> *Permitting actions against the vessel based on negligence will meet the objective of encouraging safety because the vessel will still be required to exercise the same care as a land-based person in providing a safe place to work.* Thus, nothing in this bill is intended to derogate from the vessel's responsibility to take appropriate corrective action where it knows or should have known about a dangerous condition.

(Emphasis added). Appendix I-10. Petitioner suggests that immunity from liability for the shipowner is the only way to encourage safety. Immunity was asked of Congress and rejected specifically. The reports state:

> *The Committee rejected the proposal originally advanced by the industry, that vessels should be treated as joint employers of longshoremen or other persons covered under this Act working on board such vessels. This would result in restricting the vessel's liability in all cases to the compensation and other benefits payable under the Act.* The Committee believes that where a longshoreman or other worker covered under this Act is injured through the fault of the vessel, the vessel should be liable for damages as a third party, just as land-based third parties in non-maritime pursuits are liable for damages when, through their fault, a worker is injured.

(Emphasis added). Appendix I-7.

Petitioner argues that "third-party actions continue to divert resources to attorneys for what is often little or no benefit to the injured worker, and in so doing undermine the security inherent in the compensation system." (Petitioner's Brief at 28)

The argument is faulty because resources cannot be diverted from the compensation system by reason of third-party suits. The amendments absolutely and clearly ban the return of any indirect liability of the employer under the *Ryan* case, supra. Thus, there can be no diversion of

compensation resources because the amendments state that "the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void." 33 U.S.C. §905(b) (1976). The compensation system pays no more than the scheduled compensation benefits regardless of the fault of the employer or any one else.[19]

Both petitioner and petitioner's amicus argue that the rule of the Ninth Circuit completely exonerates the stevedore employer and, therefore, the stevedore is encouraged to be negligent because it knows it will not have to bear the cost of any injuries. This argument is patently transparent because in all cases of injury to longshoremen, the stevedore company is required to pay compensation benefits without regard to questions of fault, there is no guarantee that any individual longshoreman will bring a third-party action against the shipping company, there is no guarantee that any individual longshoreman who brings an action against the shipping company will recover, and there is no guarantee that the amount of recovery will be sufficient to repay the stevedore company's lien. Thus, the argument cannot stand because in all cases of shipboard injury to longshoremen the stevedore company must pay under the compensation act and there is certainly no guarantee that any reimbursement will be made on the stevedore company's lien. The certainty of compensation benefits, thus requires, that the stevedore employer exercise as much care as possible, but, at the same time, the possibility that there can be a third-party recovery against the shipowner also encourages the shipowner to be prudent in its responsibility to furnish a safe place to work and to make sure conditions aboard the vessel are reasonably safe. This is perfectly consistent with the congressional concept that there are mutual duties and in-

19. However, the compensation system can become more secure by the collection of its lien rights for damages caused by negligent shipowners. 33 U.S.C. §933.

centives for both the stevedoring company and the shipowner to maintain safety in the working place.

Petitioner cites Prosser in arguing that the circuit court's decision in this case overlooks the first element in a negligence action; namely, duty. The statement that there is or is not a duty begs the essential question—whether the plaintiff's interests are entitled to legal protection against the defendant's conduct.[20] The work relationship involving shipowners and longshoremen is one discussed in the committee reports and the legal protection to longshoremen flowing out of that relationship is one which requires the shipowner to exercise due care to provide "a safe place to work" and to take "appropriate corrective action where it knows or should have known about a dangerous condition.[21]

Petitioner argues that the shipowner should be insulated from any responsibility to longshoremen once the working area has been turned over to the longshore crew. The oil spill example at Appendix I-10 certainly refutes this argument, since the question of control, time limits, obviousness of danger and turning over the work areas are not mentioned as limits on the shipowner's duty. It is significant, however, that the reports state that "nothing

20. "The statement that there is or is not a duty begs the essential question—whether the plaintiff's interests are entitled to legal protection against the defendant's conduct. It is therefore not surprising to find that the problem of duty is as broad as the whole law of negligence and that no universal test for it ever has been formulated. It is a shorthand statement of a conclusion, rather than an aid to analysis in itself. It is embedded far too firmly in our law to be discarded, and no satisfactory substitute for it, by which the defendant's responsibility may be limited, has been devised. But it should be recognized that "duty" is not sacrosanct in itself, but only an extension of the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection.

There is little analysis of the problems of duty in the courts. Frequently it is dealt with in terms of what is called 'proximate cause,' usually with resulting confusion. In such cases, the question of what is 'proximate' and that of duty are fundamentally the same: whether the interests of plaintiff are to be protected against the particular invasion by the defendant's conduct." W. Prosser, Handbook of the Law of Torts, 325, 326 (4th ed. 1971).

in this bill is intended to derogate from the vessel's responsibility to take appropriate corrective action where it knows or should have known about a dangerous condition."[21] The continuing duty of the shipowner is therefore obvious.

Petitioner argues that since this court decided *Edmonds, supra,* there is no fair way that a case, such as the one at bar, can be handled except to dismiss it on the same basis that the district court did. It is respectfully submitted that the question of proportional contribution is not an issue in this case, but rather, the only question is whether the shipowner acted prudently under the circumstances existing at the time of the accident.

Petitioner decries the fact that the rule adopted by the Ninth Circuit makes summary dismissal of cases more difficult. The object of Congress was not to provide for easy dismissal of cases of shipowners' negligence. Congress specifically preserved the right of injured workmen to sue ships for negligence. To argue the cost of litigation, the need to dismiss cases, and the need to regulate attorneys' fees, is to argue irrelevancies. If Congress had desired to regulate attorneys' fees, it could have easily done so. If Congress had decided to eliminate causes of action for negligence, it could easily have done so. If Congress had decided to immunize shipowners from their own negligence, it could easily have done so. On the contrary, Congress decided to preserve the cause of action for negligence against shipowners and litigation was foreseen as the vehicle for deciding disputed questions. Appendix I-11.

G. Response to Amicus Brief in Support of Petitioner

1. Amicus argues that the shipowner has no responsibility in this case as a matter of law because the stevedore employer was the only party with actual knowledge of an unsafe condition, the stevedore controlled the area, and the

21. Committee Reports, Appendix I-10.

stevedore had affirmative duties under the safety and health regulations for longshoring to either report the defective winch or to not use it. As a result, therefore, amicus urges adoption of the trial court's dismissal by means of the summary judgment device. The arguments of the amicus are fallacious for the following reasons:

(a) 29 C.F.R. §1918.2(b) and 29 C.F.R. §1915.1(d) make it clear that the responsibility for safety can be dual; that is, can rest both on the stevedore-company and on the shipowner. Thus, the regulation states:

> It is not the intent of the regulations of this part to place additional responsibilities or duties on owners, operators, agents or masters of vessels unless such persons are acting as employers. *Nor is it the intent of these regulations to release such owners, operators, agents or masters of vessels from responsibilities or duties now placed upon them by law, regulation or custom.*

(Emphasis added) Thus, even though the regulations are directed against the longshore employer, nothing in them derogates from the responsibility of the shipowner to perform duties placed upon him by law, regulation or custom. The regulations pre-dated the amendments of 1972 and are still in effect today. Thus, it is submitted that the committee reports took into account and reaffirmed the mutual obligations of both stevedore employer and shipowner.[22] The plain language of the reports makes it clear that the shipowner has a concurrent responsibility to exercise reasonable care to provide a safe place to work, which continues.

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22. The committee reports state:
"Thus, nothing in this bill is intended to derogate from the vessel's responsibility to take appropriate corrective action where it knows or should have known about a dangerous condition."
The reports go on to cite the oil spill example which permits actions against the vessel for negligence in cases in which the oil or foreign substance "had been on the deck for such a period of time that it should have been discovered and removed by the vessel in the exercise of reasonable care by the vessel under the circumstances." (Appendix I-10)

(b) Amicus assumes, in the same manner that the district court assumed, that the shipowner did not have actual knowledge of the malfunctioning winch nor should it have acquired knowledge in the exercise of reasonable care. This assumption is an erroneous "finding of fact" in the same sense the trial court's conclusion was an erroneous "finding of fact."[23]

(c) The effect of the amicus argument is to simply use any evidence of negligence on the part of the stevedore company or its employees to immunize itself from all liability. Not only did Congress not intend this result, but this Court in the *Edmonds* case, *above,* rejected the concept that a concurrent tortfeasor may be either freed from its responsibility in whole or in part by pointing to the negligent acts of the stevedore employer. In 2A A. Larson, The Law of Workmen's Compensation §75.22 at 14-263 (1976), Professor Larson states that when an employer's negligence concurs with a third party's negligence in causing an employee's injury "it is generally held that the employer cannot be met with the defense that his own employer's negligence contributed to the injury." The real effect of the argument of the amicus is that the concurrent negligence of the employer, as alleged in this case, must be an absolute and total defense against the claim of the employee for injuries against the shipowner. Thus, the result the amicus urges is the same result which was rejected in the *Edmonds* case above that "leads to the conclusion that the injured longshoreman should *never* be able to bring suit against the vessel unless it is the sole cause of the injury. This is a doubly absurd conclusion." *Edmonds, supra,* 443 U.S. 265, 266.

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23. A jury could find that, in the words of Hawran, "the day shift was complaining [about the winches] and they [the shipowner] just can't seem to do anything with them."

A jury could find that the shipowner had an adequate opportunity to discover the malfunctioning winch, that complaints were made, that the condition had existed for two and one-half days prior to the accident, and that the shipowner's representatives were in the area throughout the loading.

The amicus attaches three addenda which not only are not in evidence in this case, but are irrelevant to the issues in this case. Respondent respectfully objects to those addenda and asks that they be stricken as improper. Likewise, the arguments based on the addenda are improper and should be stricken and ignored.

Thus, the amicus argues the vast and munificent benefits flowing to injured longshoremen from the compensation act under Addenda B and C.[24] Neither schedule is properly before the court since neither is in evidence or in the record. To argue as amicus does, that the cumulative benefits over thirty-one years to a totally disabled longshoreman would amount to $2,263,834.00 is just as irrelevant as if the respondent were to argue that as a result of his injuries Mr. Santos has been subjected to horrendous pain and suffering, three major surgeries, quadraplegia, and has been denied his benefits under the Act and, therefore, his wife and five children are starving.

The amicus argument concerning "blindfolding the jury" is irrelevant because there is no issue of damages before the Court in this case. Likewise, the final argument of the amicus concerning the reduction in numbers of longshoremen's personal injury cases is totally irrelevant and inappropriate to any consideration of the issues in the case at bar.

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24. Identical bills are pending in the House and Senate which would greatly reduce the benefits payable under the Act. S.1511, 96th Cong., 1 CCH Cong. Index, 14,217 (1980); H.R. 2448, 96th Cong., 2 CCH Cong. Index 28,276 (1980).

V.
CONCLUSION

The decision of the circuit court in this case is carefully cognizant of, and faithful to, the intent of Congress in amending the Act. The unseaworthiness remedy is abolished, but the negligence remedy is preserved along with the prohibitions against assumption of risk and contributory negligence. Subjecting a vessel to liability for injuries to longshoremen working on or near a vessel if the shipowner knew or should have known of dangerous conditions creating an unreasonable risk to longshoremen and failed to exercise reasonable care under the circumstances to protect the longshoreman, is consistent with traditional negligence principles as adopted by this court in the *Kermarec* case. The standard adopted by the Ninth Circuit is simple, practical and workable. The decision of the Ninth Circuit should be affirmed in all respects.

Respectfuly submitted,

JAMES A. GRUTZ
JACKSON, ULVESTAD,
GOODWIN & GRUTZ
Attorneys for Respondent,
Lauro De Los Santos

APPENDIX I

Pertinent excerpts from Senate Report No. 92-1125, 92nd Congress, 2nd Session:

LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT AMENDMENTS OF 1972

SEPTEMBER 14 (Legislative day, SEPTEMBER 12), 1972. —

Ordered to be printed

Filed under authority of the order of the Senate of September 13, legislative day, September 12, 1972

MR. EAGLETON, from the Committee on Labor and Public Welfare, submitted the following

REPORT

[To accompany S. 2318]

The Committee on Labor and Public Welfare, to which was referred the bill (S. 2318) to amend the Longshoremen's and Harbor Workers' Compensation Act, and for other purposes, having considered the same, reports favorably thereon with an amendment and recommends that the bill as amended do pass.

SUMMARY

The principle purpose of S. 2318 is to amend the Longshoremen's and Harbor Workers' Compensation Act in order to upgrade the benefits, extend coverage to protect additional workers, provide a specified cause of action for damages against third parties and to promulgate necessary administrative reforms.

The benefit structure provided by S. 2318 will allow a disabled worker to receive ⅔ of his average weekly wage subject to a phased in maximum starting at 125 percent of the national average weekly wage and rising in three years to 200 percent of the national average weekly wage. Minimum benefits would also increase to not less than 50 percent of the national average weekly

wage, or the average weekly wage of the disabled worker, whichever is less. The new maximum and minimum limits are substantially higher than the present maximum of $70 per week, and present minimum of $18 per week, which were established in 1961.

The changes also provide for annual increases in compensation benefits based on increases in the national average weekly wage, an upgrading of benefits payable for injuries occurring before the effective date of the Act, elimination of the present ceiling on temporary disabilities, and expansion of survivors benefits and the schedule of awards for disfigurements.

The bill also expands the coverage of this Act to cover injuries occurring in the contiguous dock area related to longshore and ship repair work.

The bill also resolves the longstanding dispute over third-party actions by injured longshoremen by providing that such actions may be brought against vessels on the basis of negligence, but the remedy based on unseaworthiness is eliminated. In addition, indemnity actions against stevedoring companies are prohibited. Agreements between stevedoring companies and vessels to indemnify the later are prohibited.

A number of important administrative changes are made in the bill respecting both the worker's rights and the operations of the Department of Labor. Among the features of the administrative changes are that hearings be conducted according to the Administrative Procedure Act, assistance (including discretionary legal assistance where circumstances warrant) be provided claimants, medical services allowing for free choice of doctors and reduction of waiting periods for compensation. A review board for compensation cases is created within the Department of Labor and a special fund to handle second injury cases, rehabilitation and retroactive benefit payment is revised and expanded.

In considering S. 2318 the committee has given most careful consideration to the recommendations of the National Commission on state workmen's compensation laws contained in its report issued on July 21, 1972. The com-

mittee believes that the provisions in this bill are fully consistent with the recommendation of the National Commission and that the Longshoremen's and Harbor Workers' Compensation Act, as it would be amended by S. 2318, will provide an adequate, prompt, and equitable system of compensation for the over 800,000 employees who depend upon its protection.

SAFETY

It is important to note that adequate workmen's compensation benefits are not only essential to meeting the needs of the injured employee and his family, but, by assuring that the employer bears the cost of unsafe conditions, serve to strengthen the employer's incentive to provide the fullest measure of on-the-job safety.

This consideration is particularly crucial with respect to high-risk occupations such as those covered by this Act. Longshoring, for example, has an injury frequency rate which is well over four times the average for manufacturing operations. It is the Committee's view that every appropriate means be applied toward improving the tragic and intolerable conditions which take such a heavy toll upon workers' lives and bodies in this industry, and such means clearly include vigorous enforcement of the Maritime Safety Amendments of 1958 and the Occupational Safety and Health Act of 1970, as well as a workmen's compensation system which maximizes industry's motivation to bring about such an improvement.

BACKGROUND

On July 21, 1971, S. 2318 was introduced by Senator Williams for himself and nine other Senators. A similar bill, S. 525 was introduced by Senator Prouty, and Senator Tower introduced S. 1547, a bill to extend the coverage of the Longshoremen's and Harbor Workers' Compensation Act to marine petroleum workers.

The Subcommittee on Labor held hearings on these bills on May 2, 10, 17, and 24, 1972 in Washington, D.C. and on June 5, 1972 in San Francisco, California. A field trip to examine actual working conditions was held by the Subcommittee in San Francisco and Oakland, California on June 4, 1972.

Testimony was received from the Secretary of Labor in support of the increase in benefits and a revision of the law regarding third party liability for injuries to longshoremen.

Statements were received from the following persons who represent employers involved in industries covered by the Longshoremen's and Harbor Workers' Compensation Act: Ralph Hartman and Edward Hood, representing the Shipbuilders Council of America; Andre Maisonpierre, Vice President of the American Mutual Insurance Alliance; Francis A. Scanlan, James A. Flynn, and Edward D. Vickery on behalf of the National Maritime Compensation Committee; Dennis Lindsay, representing the Master Contracting Stevedoring Association of the Pacific Coast, Inc.; Capt. John H. Anthony, President of the Metropolitan Stevewore Co.; Fred R. Smith, Chairman of the Board of the Seattle Stevedore Co. & Southeast Stevedoring Corp.; Emmett J. Pierce, Vice President of the Marine Terminals Corp.; Chester Eschen, Jr., President of the California Stevedore & Balast Co.; and Robert P. Benfield, Vice President of Bayly, Martin & Fay, Inc., insurance brokers.

The Board of Trade for the District of Columbia asked that separate workmen's compensation legislation be passed to cover the District of Columbia.

Testimony was also received from the following representatives of employees covered by the Act and by lawyers who represent such employees, all of whom favored the increased benefits which are contained in the substitute bill: Howard McGuigan and James O'Brien of the Social Security Department, AFL-CIO, and George Apperson, President, Greater Washington Central Labor Council, AFL-CIO; Thomas Gleason and Joseph Leonard, of the International Longshoremen's Association; Patrick Tobin, Julius Stern, Everett Ede, Richard Gladstein, and Tom Lupher of the International Longshoremen's and Warehousemen's Union; Mario Grossetti and C. W. Huddleston of the International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers & Helpers; David B. Kaplan, Chairman of the Admiralty Section, American Trial Lawyers Association; and John R. Martzell, representing the Louisiana Trial Lawyers Association.

Representatives of employees employed in private industry in the District of Columbia indicated these workers desired continued coverage under the Longshoremen's and Harbor Workers' Compensation Act.

Testimony was received from Joseph Shelton and E. Leland Richardson, representing the International Association of Drilling Contractors, in support of S. 1547, and from William Moody, representing the Maritime Trades Department, AFL-CIO, in opposition.

Other statements by interested parties were also received.

S. 2318 was reported favorably by the Subcommittee on Labor on August 17, 1972 and was considered by the full Committee on Labor and Public Welfare on September 8, 1972 which unanimously reported it to the Senate.

NEED FOR THE BILL

The Longshoremen's and Harbor Workers' Compensation Act was last amended in 1961, at which time the maximum benefit under the Act was set at $70 per week. Today the average weekly wage for private, non-agriculture employees in the United States is $135 a week. The average longshoremen's or ship repairman's wage is even higher, with longshoremen averaging $200 per week in some ports. Clearly, in order to provide adequate income replacement for disabled workers covered under this law a substantial increase in benefits is urgently required.

The National Commission on State Workmen's Compensation laws, in its recent report, recommends that the maximum for temporary or permanent total disability be phased up to no less than 200 percent of the statewide average weekly wage. The Committee bill, consistently with this recommended standard, raises the maximum limit on compensation under this Act to 125 percent of the national average weekly wage initially, going up to 200 percent of the national average weekly wage after three years. Of course an individual's benefits, if he qualifies for maximum benefits, would be ⅔ of his average wekly wage or this maximum, whichever is lower.

While everyone has agreed since at least the mid-1960's that the benefits under this Act should be raised, *there has been some dispute over the years as to whether such benefits should be raised so long as this compensation law was not the exclusive remedy for an injured worker. It has been the feeling of most employers that while they were willing to guarantee payment to an injured worker regardless of fault, they would only do so if the right to such payment was the exclusive remedy and they would not be subject to additional law suits because of that injury.*

Since 1946, due to a number of decisions by the U.S. Supreme Court, it has been possible for an injured longshoreman to avail himself of the benefits of the Longshoremen's and Harbor Workers' Compensation Act and to sue the owner of the ship on which he was working for damages as a result of his injury. The Supreme Court has ruled that such ship owner, under the doctrine of seaworthiness, was liable for damages caused by any injury regardless of fault. In addition, shipping companies generally have succeeded in recovering the damages for which they are held liable to injured longshoremen from the stevedoring on theories of express or implied warranty, thereby transferring their liability to the stevedore company, the actual employer of the longshoremen.

The social costs of these law suits, the delays, crowding of court calendars and the need to pay for lawyers' services have seldom resulted in a real increase in actual benefits for injured workers.

For a number of years representatives of the employees have attempted to have the benefit levels under the Act raised so that injured workers would be properly protected by the Act. *At the same time, employer groups indicated their willingness to increase such payments but indicated they could do so only if the Longshoremen's and Harbor Workers' Compensation Act were to again become the exclusive remedy against the stevedore as had been intended since its passage in 1927 until modified by various Supreme Court decisions.*

The bill reported by the committee meets these objections by specifically eliminating suits against vessels

brought for injuries to longshoremen under the doctrine of seaworthiness and outlawing indemnification actions and "hold harmless" or indemnity agreements. It continues to allow suits against vessels or other third parties for negligence. At the same time it raises benefits to a level commensurate with present day salaries and with the needs of injured workers whose sole support will be payments under the Act.

. . . .

ELIMINATION OF UNSEAWORTHINESS REMEDY

One of the most controversial and difficult issues which the Committee has been required to resolve in connection with this bill concerns the liability of vessels, as third parties, to pay damages to longshoremen who are injured while engaged in stevedoring operations. *The Committee rejected the proposal, originally advanced by the industry, that vessels should be treated as joint employers of longshoremen or other persons covered under this Act working on board such vessels. This would result in restricting the vessel's liability in all cases to the compensation and other benefits payable under the Act. The Committee believes that where a longshoreman or other worker covered under this Act is injured through the fault of the vessel, the vessel should be liable for damages as a third party, just as land-based third parties in non-maritime pursuits are liable for damages when, through their fault, a worker is injured.*

The Committee also rejected the thesis that a vessel should be liable without regard to its fault for injuries sustained by employees covered under this Act, while working on board the vessel. Vessels have been held to what amounts to such absolute liability by decisions of the Supreme Court, commencing with *Seas Shipping Co. v. Sieracki*, 328 U.S. 25 (1946) which held that the traditional seaman's remedy based on the breach of the vessel's absolute, nondelegable duty to provide a seaworthy vessel was also available to longshoremen and others who performed work on the vessel which by tradition has been performed by seamen. Under the *Sieracki* case, vessels are liable, as third parties, for injuries suffered by longshoremen as a result of "unseaworthy" conditions even though the unseaworthiness was caused, created, or brought into

play by the stevedore (or an employee of the stevedore) rather than the vessel or any member of its crew. *For example, under present law, if a member of a longshore gang spills grease on the deck of a vessel and a longshoreman slips and falls on the grease a few moments later, the vessel is liable to pay damages for the resulting injuries, even though no member of the crew was responsible for creating the unseaworthy condition or was even aware of it.* Furthermore, in the example given above, under the Supreme Court's decision in *Ryan Stevedoring Co. v. Pan Atlantic S.S. Corp.*, 350 U.S. 124 (1956), the vessel may recover the damages for which it is liable to the injured longshoreman from the stevedore which employed the longshoreman on the theory that the stevedore has breached an express or implied warranty of workmanlike performance to the vessel. *The end result is that, despite the provision in the Act which limits an employer's liability to the compensation and medical benefits provided in the Act, a stevedore-employer is indirectly liable for damages to an injured longshoreman who utilizes the technique of suing the vessel under the unseaworthiness doctrine.*

The Committee heard testimony that the number of third-party actions brought under the *Sieracki* and *Ryan* line of decisions has increased substantially in recent years and that much of the financial resources which could better be utilized to pay improved compensation benefits were now being spent to defray litigation costs. Industry witnesses testified that despite the fact that since 1961 injury frequency rates have decreased in the industry, and maximum benefits payable under the Act have remained constant, the cost of compensation insurance for longshoremen has increased substantially because of the increased number of third party cases and legal expenses and higher recoveries in such cases. The Committee also heard testimony that in some cases workers were being encouraged not to file claims for compensation or to delay their return to work in the hope of increasing their possible recovery in a third party action. The Committees attention was also called to the decision in 1966 of the United States district court in Philadelphia concerning the impact of third party claims involving injured longshoremen on the backlog of personal injury cases in that court.

The Committee also has taken note of the inescapable fact that the controversy over third party claims by longshoremen has had political ramifications which have resulted in forestalling any improvements in the present Act for over twelve years.

The Committee believes that especially with the vast improvement in compensation benefits which the bill would provide, there is no compelling reason to continue to require vessels to assume what amounts to absolute liability for injuries which occur to longshoremen or other workers covered under the Act who are injured while working on those vessels. In reaching this conclusion, the Committee has noted that the seaworthiness concept was developed by the courts to protect seamen from the extreme hazards incident to their employment which frequently requires long sea voyages and duties of obedience to orders not generally required of other workers. The rationale which justifies holding the vessel absolutely liable to seamen if the vessel is unseaworthy does not apply with equal force to longshoremen and other non-seamen working on board on vessel while it is in port.

Accordingly, the Committee has concluded that, given the improvement in compensation benefits which this bill would provide, it would be fairer to all concerned and fully consistent with the objective of protecting the health and safety of employees who work on board vessels for the liability of vessels as third parties to be predicated on negligence, rather than the no-fault concept of seaworthiness. This would place vessels in the same position, insofar as third party liability is concerned, as land-based third parties in non-maritime pursuits.

The purpose of the amendments is to place an employee injured aboard a vessel in the same position he would be if he were injured in non-maritime employment ashore, insofar as bringing a third party damage action is concerned, and not to endow him with any special maritime theory of liability or cause of action under whatever judicial nomenclature it may be called, such as "unseaworthiness", "non-delegable duty", or the like.

Persons to whom compensation is payable under the Act retain the right to recover damages for negligence against the vessel, but under these amendments they cannot bring a damage action under the judicially-enacted doctrine of unseaworthiness. Thus a vessel shall not be lable in damages for acts or omissions of stevedores or employees of stevedores subject to this Act, Crumedy vs. The J.H. Fisser, 358 U.S. 423, *Albanese vs. Matts,* 382 U.S. 283, *Skibinski vs. Waterman SS Corp.* 330 F.2d 539; *for the manner or method in which stevedores or employees of stevedores subject to this Act perform their work, A.N.G. Stevedores vs. Ellerman Lines,* 369 U.S. 355, *Blassingill vs. Waterman SS. Corp.,* 336 F 2d 367; *for gear or equipment of stevedores or employees of stevedores subject to this Act whether used aboard ship, or ashore, Alaska SS Co. vs. Peterson,* 347 U.S. 396, *Italia Societa vs. Oregon Stevedoring Co.,* 376 U.S. 315, *or for other categories of unseaworthiness which have been judicially established. This listing of cases is not intended to reflect a judgment as to whether recovery on a particular actual setting could be predicated on the vessel's negligence.*

Permitting actions against the vessel based on negligence will meet the objective of encouraging safety because the vessel will still be required to exercise the same care as a land-based person in providing a safe place to work. Thus, nothing in this bill is intended to derogate from the vessel's responsibility to tape appropriate corrective action where it knows or should have known about a dangerous condition.

So, for example, where a longshoreman slips on an oil spill on a vessel's deck and is injured, the proposed amendments to Section 5 would still permit an action against the vessel for negligence. To recover he must establish that: 1) the vessel put the foreign substance on the deck, or knew that it was there, and willfully or negligently failed to remove it; or 2) the foreign substance had been on the deck for such a period of time that it should have been discovered and removed by the vessel in the exercise of reasonable care by the vessel under the circumstances. The vessel will not be chargeable with the negligence of the stevedore or employees of the stevedore.

Under this standard, as adopted by the Committee, there will of course, be disputes as to whether the vessel was negligent in a particular case. Such issues can only be resolved through the application of accepted principles of tort law and the ordinary process of litigation—just as they are in cases involving alleged negligence by land-based third parties. The Committee intends that on the one hand an employee injured on board a vessel shall be in no less favorable position vis a vis his rights against the vessel as a third party than is an employee who is injured on land, and on the other hand, that the vessel shall not be liable as a third party unless it is proven to have acted or have failed to act in a negligent manner such as would render a land-based third party in non-maritime pursuits liable under similar circumstances.

The Committee also believes that the doctrine of the *Ryan* case, which permits the vessel to recover the damages for which it is liable to an injured worker where it can show that the stevedore breaches an express or implied warranty of workmanlike performance is no longer appropriate if the vessel's liability is no longer to be absolute, as it essentially is under the sea worthiness doctrine. *Since the vessel's liability is based on its own negligence, and the vessel will no longer be liable under the seaworthiness doctrine for injuries which are really the fault of the stevedore, there is no longer any necessity for permitting the vessel to recover the damages for which it is liable to the injured worker from the stevedore or other employer of the worker.*

Furthermore, unless such hold-harmless, indemnity or contribution agreements are prohibited as a matter of public policy, vessels by their superior economic strength could circumvent and nullify the provisions of Section 5 of the Act by requiring indemnification from a covered employer for employee injuries.

Accordingly, the bill expressly prohibits such recovery, whether based on an implied or express warranty. It is the Committee's intention, to prohibit such recovery under any theory including, without limitation, theories based on contract or tort.

Under the proposed amendments *the vessel may not by contractual agreement or otherwise require the employer to indemnify it, in whole or in part, for such damages.*

The Committee has also recognized the need for special provisions to deal with a case where a longshoreman or ship builder or repairman is employed directly by the vessel. In such case, notwithstanding the fact that the vessel is the employer, the Supreme Court, in *Reed v. S.S. Yaka,* 373 U.S. 410 (1963) and *Jackson v. Lykes Bros. Steamship Co.,* 386 U.S. 371 (1967), held that the unseaworthiness remedy is available to the injured employee. The Committee believes that the rights of an injured longshoreman or ship builder or repairman should not depend on whether he was employed directly by the vessel or by an independent contractor. Accordingly, the bill provides in the case of a longshoreman who is employed directly by the vessel there will be no action for damages if the injury was caused by the negligence of persons engaged in performing longshoring services. Similar provisions are applicable to ship building or repair employees employed directly by the vessel. The Committee's intent is that the same principles should apply in determining liability of the vessel which employs its own longshoremen or ship builders or repairmen as apply when an independent contractor employs such persons.

Finally, the Committee does not intend that the negligence remedy authorized in the bill shall be applied differently in different ports depending on the law of the State in which the port may be located. The Committee intends that legal questions which may arise in actions brought under these provisions of the law shall be determined as a matter of Federal law. In that connection, the Committee intends that the admiralty concept of comparative negligence, rather than the common law rule as to contributory negligence, shall apply in cases where the injured employee's own negligence may have contributed to causing the injury. Also, the Committee intends that the admiralty rule which precludes the defense of "assumption of Risk" in an action by an injured employee shall also be applicable.

Finally, the Committee wishes to emphasize that nothing in this bill is intended to relieve *any vessels or any other persons from their obligations and duties under the Occupational Safety and Health Act of 1970.* The Committee recognizes that progress has been made in reducing injuries in the longshore industry, but longshoring remains one of the most hazardous types of occupations. The Committee

expects to see further progress in reducing injuries and stands ready to immediately reexamine the whole third party suit question if it appears that the changes made in present law by this bill have affected progress in improving occupational health and safety. (Emphasis added)

* * * *

The House Report No. 92-1441, 92nd Congress, 2nd Session, reprinted in 1972 U.S. Code Cong., and Admin. News 4698-4705 is identical in its discussion of the legislative history as it applies to the case at bar contained in the section entitled "Elimination of Unseaworthiness Remedy."

APPENDIX II

TITLE E. SPECIAL LIABILITY OF POSSESSORS OF LAND TO INVITEES

§ 343. Dangerous Conditions Known to or Discoverable by Possessor

A possesor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he

(a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and

(b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and

(c) fails to exercise reasonable care to protect them against the danger.

See Reporter's Notes.

Comment:

a. This Section should be read together with § 343 A, which deals with the effect of the fact that the condition is known to the invitee, or is obvious to him, as well as the fact that the invitee is a patron of a public utility. That Section limits the liability here stated. In the interest of brevity, the limitation is not repeated in this Section.

b. Distinction between duties to licensee and invitee. One who holds his land open for the reception of invitees is under a greater duty in respect to its physical condition than one who permits the visit of a mere licensee. The licensee enters with the understanding that he will take the land as the possessor himself uses it. Therefore such a licensee is entitled to expect only that he will be placed upon an equal footing with the possessor himself by an adequate disclosure of any dangerous conditions that are known to the possessor. On the other hand an invitee enters upon an implied representation or assurance that the land has been prepared and made ready and safe for his reception. He is therefore entitled to expect that the

possessor will exercise reasonable care to make the land safe for his entry, or for his use for the purposes of the invitation. He is entitled to expect such care not only in the original construction of the premises, and any activities of the possessor or his employees which may affect their condition, but also in inspection to discover their actual condition and any latent defects, followed by such repair, safeguards, or warning as may be reasonably necessary for his protection under the circumstances.

As stated in § 342, the possessor owes to a licensee only the duty to exercise reasonable care to disclose to him dangerous conditions which are known to the possessor, and are likely not to be discovered by the licensee. To the invitee the possessor owes not only this duty, but also the additional duty to exercise reasonable affirmative care to see that the premises are safe for the reception of the visitor, or at least to ascertain the condition of the land, and to give such warning that the visitor may decide intelligently whether or not to accept the invitation, or may protect himself against the danger if he does accept it.

As stated in § 342, the possessor is under no duty to protect the licensee against dangers of which the licensee knows or has reason to know. On the other hand, as stated in § 343 A, there are some situations in which there is a duty to protect an invitee against even known dangers, where the possessor should anticipate harm to the invitee notwithstanding such knowledge.

c. As to invitees who go beyond the scope of the invitation, as to either time or place, see § 332, Comment *l.*

d. What invitee entitled to expect. An invitee is entitled to expect that the possessor will take reasonable care to ascertain the actual condition of the premises and, having discovered it, either to make it reasonably safe by repair or to give warning of the actual condition and the risk involved therein. Therefore an invitee is not required to be on the alert to discover defects which, if he were a mere licensee, entitled to expect nothing but notice of known defects, he might be negligent in not discovering. This is of importance in determining whether the visitor is or is not guilty of contributory negligence in failing to dis-

cover a defect, as well as in determining whether the defect is one which the possessor should believe that his visitor would not discover, and as to which, therefore, he must use reasonable care to warn the visitor.

e. Preparation required for invitee. In determining the extent of preparation which an invitee is entitled to expect to be made for his protection, the nature of the land and the purposes for which it is used are of great importance. One who enters a private residence even for purposes connected with the owner's business, is entitled to expect only such preparation as a reasonably prudent householder makes for the reception of such visitors. On the other hand, one entering a store, theatre, office building, or hotel, is entitled to expect that his host will make far greater preparations to secure the safety of his patrons than a householder will make for his social or even his business visitors. So too, one who goes on business to the executive offices in a factory, is entitled to expect that the possessor will exercise reasonable care to secure his visitor's safety. If, however, on some particular occasion, he is invited to go on business into the factory itself, he is not entitled to expect that special preparation will be made for his safety, but is entitled to expect only such safety as he would find in a properly conducted factory.

f. Appliances used on land. A possessor who holds his land open to others must possess and exercise a knowledge of the dangerous qualities of the place itself and the appliances provided therein, which is not required of his patrons. Thus, the keeper of a boardinghouse is negligent in providing a gas stove to be used in an unventilated bathroom, although the boarder who is made ill by the fumes uses the bathroom with knowledge of all the circumstances, except the risk of so doing. This is true because the boardinghouse keeper, even though a man of the same class as his boarders, is required to have a superior knowledge of the dangers incident to the facilities which he furnishes to them.

g. As to the duty of a possessor of business premises to protect his invitees from harm threatened thereon by third persons, see § 344.

§ 343 A. Known or Obvious Dangers

(1) A possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness.

(2) In determining whether the possessor should anticipate harm from a known or obvious danger, the fact that the invitee is entitled to make use of public land, or of the facilities of a public utility, is a factor of importance indicating that the harm should be anticipated.

See Reporter's Notes.

Comment on Subsection (1):

a. The rule stated in this Subsection applies to all persons who enter or remain on land in the capacity of invitees, as defined in § 332. It includes in particular the patrons of a public utility who enter land in its possession seeking its services, to which as members of the public they are entitled; and it includes members of the public making use of the land of the government or a government agency which is held open for the use of the public. As is stated in Subsection (2), such a public utility, government, or government agency may have special reason to anticipate that one who so enters will proceed to encounter known or obvious dangers; and such a defendant may therefore be subject to liability in some cases where the ordinary possessor of land would not.

b. The word "known" denotes not only knowledge of the existence of the condition or activity itself, but also appreciation of the danger it involves. Thus the condition or activity must not only be known to exist, but it must also be recognized that it is dangerous, and the probability and gravity of the threatened harm must be appreciated. "Obvious" means that both the condition and the risk are apparent to and would be recognized by a reasonable man, in the position of the visitor, exercising ordinary perception, intelligence, and judgment.

c. The possessor's activities may involve a risk which is known or obvious to those who enter his land, either because the risk is inherent in the nature of the activity

itself, or because they are aware that it is carried on in a manner which involves risks that are not necessarily inherent in such activities.

d. A statute may require the possessor of land to keep it, or anything upon it, in a condition safe for invitees, or even for licensees, or to take particular precautions for the safety of such visitors. If so, the fact that the visitor knows that the possessor has not complied with the requirements of the statute does not prevent the possessor from being subject to liability for his breach of his statutory duty. Such knowledge of the violation is material only in determining whether the visitor is to be charged with contributory negligence, or assumption of risk, in coming in contact with the dangerous condition. As to this, see § 288 B and Comment *b* to that Section; also §§ 496 A—496 G.

e. In the ordinary case, an invitee who enters land is entitled to nothing more than knowledge of the conditions and dangers he will encounter if he comes. If he knows the actual conditions, and the activities carried on, and the dangers involved in either, he is free to make an intelligent choice as to whether the advantage to be gained is sufficient to justify him in incurring the risk by entering or remaining on the land. The possessor of the land may reasonably assume that he will protect himself by the exercise of ordinary care, or that he will voluntarily assume the risk of harm if he does not succeed in doing so. Reasonable care on the part of the possessor therefore does not ordinarily require precautions, or even warning, against dangers which are known to the visitor, or so obvious to him that he may be expected to discover them.

Illustration:

1. The A Company has in its store a large front door, made of heavy plate glass. The door is well lighted and plainly visible, and its existence is obvious to any person exercising ordinary attention and perception. B, a customer in the store, while preoccupied with his own thoughts, mistakes the glass for an open doorway, and runs his head against it and is injured. A Company is not liable to B.

f. There are, however, cases in which the possessor of land can and should anticipate that the dangerous condi-

tion will cause physical harm to the invitee notwithstanding its known or obvious danger. In such cases the possessor is not relieved of the duty of reasonable care which he owes to the invitee for his protection. This duty may require him to warn the invitee, or to take other reasonable steps to protect him, against the known or obvious condition or activity, if the possessor has reason to expect that the invitee will nevertheless suffer physical harm.

Such reason to expect harm to the visitor from known or obvious dangers may arise, for example, where the possessor has reason to expect that the invitee's attention may be distracted, so that he will not discover what is obvious, or will forget what he has discovered, or fail to protect himself against it. Such reason may also arise where the possessor has reason to expect that the invitee will proceed to encounter the known or obvious danger because to a reasonable man in his position the advantages of doing so would outweigh the apparent risk. In such cases the fact that the danger is known, or is obvious, is important in determining whether the invitee is to be charged with contributory negligence, or assumption of risk. (See §§ 466 and 496 D.) It is not, however, conclusive in determining the duty of the possessor, or whether he has acted reasonably under the circumstances.

Illustrations:

2. The A Department Store has a weighing scale protruding into one of its aisles, which is visible and quite obvious to anyone who looks. Behind and about the scale it displays goods to attract customers. B, a customer, passing through the aisle, is intent on looking at the displayed goods. B does not discover the scale, stumbles over it, and is injured. A is subject to liability to B.

3. The A Drug Store has a soda fountain on a platform raised six inches above the floor. The condition is visible and quite obvious. B, a customer, discovers the condition when she ascends the platform and sits down on a stool to buy some ice cream. When she has finished, she forgets the condition, misses her step, falls, and is injured. If it is found that this could reasonably be anticipated by A, A is subject to liability to B.

4. Through the negligence of A Grocery Store a fallen rainspout is permitted to lie across a footpath

alongside the store, which is used by customers as an exit. B, a customer, leaves the store with her arms full of bundles which obstruct her vision, and does not see the spout. She trips over it and is injured. If it is found that A should reasonably have anticipated this, A is subject to liability to B.

5. A owns an office building, in which he rents an office for business purposes to B. The only approach to the office is over a slippery waxed stairway, whose condition is visible and quite obvious. C, employed by B in the office, uses the stairway on her way to work, slips on it, and is injured. Her only alternative to taking the risk was to forgo her employment. A is subject to liability to C.

Comment on Susection (2):

g. In determining whether the possessor of land should expect harm to invitees notwithstanding the known or obvious character of the danger, the fact that premises have been held open to the visitor, and that he has been invited to use them, is always a factor to be considered, as offering some assurance to the invitee that the place has been prepared for his reception, and that reasonable care has been used to make it safe. There is, however, a special reason for the possessor to anticipate harm where the possessor is a public utility, which has undertaken to render services to members of the public, so that they are entitled to demand the use of its facilities, and to expect reasonable safety while using them. The same is true of the government, or a government agency, which maintains land upon which the public are invited and entitled to enter as a matter of public right. Such defendants may reasonably expect the public, in the course of the entry and use to which they are entitled, to proceed to encounter some known or obvious dangers which are not unduly extreme, rather than to forego the right.

Even such defendants, however, may reasonably assume that members of the public will not be harmed by known or obvious dangers which are not extreme, and which any reasonable person exercising ordinary attention, perception, and intelligence could be expected to avoid. This is true particularly where a reasonable alternative way is open to the visitor, known or obvious to him, and safe.

Illustrations:

6. An incoming train of the A Railroad deposits B, a passenger, upon a platform from which the only exit is over a footbridge crossing the tracks. Employees of the Railroad have encumbered the bridge with baggage from the train. B, crossing the bridge, attempts to climb over the pile of baggage, falls, and is injured. A Railroad is subject to liability to B.

7. The same facts as in Illustration 6, except that B is told by the train conductor that he may safely walk across the tracks. A Railroad is not liable to B.

8. The only convenient approach from the east to the station of A Railroad is over a footbridge which, through the negligence of the Railroad, is covered with snow and ice. The condition of the bridge is obviously dangerous, but not extremely so. The only other approach to the station, from the west, would require a detour of six blocks. B, a prospective passenger coming from the west, attempts to use the bridge rather than detour, and slips and is injured. A Railroad is subject to liability to B.

9. The A Steamship Company is engaged in unloading a passenger ship. Its pier is encumbered with trunks, baggage trucks, and many other large visible objects, but there is ample room for passage between them. B, a passenger leaving the ship, is preoccupied with her own thoughts, and stumbles over a trunk and is injured. The A Company is not liable to B.